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THE PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE IV

*David S. Bogen**

The Privileges and Immunities Clause of Article IV is deeply rooted in the historical context of English law. It developed from colonial charter provisions and the position of the colonists as subjects of a common king, evolved as the colonies expanded, survived the Revolutionary War in the Articles of Confederation and was eventually adopted in the Constitution. This Article traces the history of the Privileges and Immunities Clause in order to elaborate on the original intent embodied in its language.

Professor Bogen states that the clause did not embody natural law concepts, but was solely concerned with creating a national citizenship. He contends that fear of a natural law interpretation has incorrectly prevented the Court from finding the clause applicable to citizens in the state where they reside. He suggests that a full examination of the historical origin of the clause could lead to a more concrete basis for judicial interpretation. In addition to the right to be free of discrimination based on non-residence when citizens of one state visit another state, the author concludes that the Privileges and Immunities Clause of Article IV secured for citizens of the United States the right to interstate travel and to become citizens of other states without discrimination based on place of prior residence.

THE COMMITTEE appointed to prepare an Exposition of the Confederation, a plan for its complete execution and supplemental articles report, . . . that the Confederation requires execution . . . [b]y describing the privileges and immunities to which the citizens of one State are entitled in another.¹

INTRODUCTION

The first sentence of article IV, section 2 of the United States

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1. 21 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 894 (G. Hunt ed. 1912) [hereinafter JOURNALS].

Constitution sets forth the obligation which each state owes to the citizens of other states: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."² This provision was derived from article IV of the Articles of Confederation which James Wilson described at the Constitutional Convention as "the Article of Confederation making the Citizens of one State Citizens of all."³ Alexander Hamilton wrote in the *Federalist Papers* that: "It may be esteemed the basis of the Union that the 'citizens of each state shall be entitled to all the privileges and immunities of citizens of the several States.'"⁴

The principle that states have a special obligation to the citizens of other states was crucial in developing a common national identity. Fortunately, the principle's vitality did not depend upon precise definition of the obligation it imposed, for uncertainty over its application was voiced at the outset. When the Articles of Confederation were ratified, the congressional committee on implementation noted a need to describe the privileges and immunities which citizens of one state were entitled to in another state under article IV's predecessor.⁵ Neither the committee nor Congress ever clarified the clause further.

Two centuries after the article IV privileges and immunities clause ("clause") was adopted, disagreement continues over its meaning and application.⁶ The clause's history has played little role in the debate. The absence in judicial opinion of any detailed historical study of the clause reflects in part the lack of discussion in scholarly literature.⁷ One reason for this absence may be the spar-

2. U.S. CONST. art. IV, § 2, cl. 1.

3. NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON 441 (A. Koch ed. 1966) [hereinafter NOTES OF DEBATES]. See also THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 272 (M. Farrand ed. 1937) [hereinafter RECORDS].

4. THE FEDERALIST No. 80, at 478 (A. Hamilton) (C. Rossiter ed. 1961).

5. See *supra* note 1 and accompanying text.

6. *Baldwin v. Fish and Game Comm'n*, 436 U.S. 371 (1978) (6-3 decision on whether privileges and immunities is limited category of fundamental rights or whether all discrimination must be justified); *United Building & Construction Trades Council v. Camden*, 465 U.S. 208 (1984) (8-1 decision on application of clause to laws discriminating on basis of municipal residence); *Supreme Court of N.H. v. Piper*, 470 U.S. 274 (1985) (application of a least restrictive alternative test to discrimination). See also *Zobel v. Williams*, 457 U.S. 55, 71 (1982) (O'Connor, J., concurring); *Attorney Gen. of N.Y. v. Soto-Lopez*, 106 S. Ct. 2317, 2329, 2330, 2333 (1986) (O'Connor, J., dissenting) (argue that the right to settle in another state is protected through an art. IV basis to challenge durational residency requirements).

7. But see P. FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM AND COMITY 30-40 (1981) (impact of art. IV on interstate travel with slaves); J. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870, at 220-30 (1978) (notes

sity of the record on the clause's adoption. There is virtually no report of significant discussion of the clause's meaning prior to its adoption in the Constitution. Only scattered comments and early drafts shed light on its intended scope.

This Article sets forth the fragmentary record of article IV's adoption and speculates, based on that record, about the intent of the article IV Framers. It poses more questions than it answers, for a closer look at the clause's origins discloses the relevance of colonial and English feudal history. This Article is a preliminary sketch. It is intended to encourage others to explore and augment the story or to demonstrate that the development took a different line.

The outline drawn here suggests that the privileges and immunities clause was not a reference to natural law, but was solely concerned with creating a national citizenship. It referred to the rights of citizens of the nation to travel freely among the states, to become full citizens of any state they wished without discrimination based on place of prior residence, and to be free of discrimination based on nonresidence when they merely visited another state. At the same time, privileges and immunities were an evolving concept, so that the specific understandings held in 1787 should not control modern decisions. These tentative conclusions support Justice O'Connor's position that durational residence cases should be analyzed under Article IV. They also support the proposition that all laws are within privileges and immunities clause, and that the key issue under Article IV is whether distinctions based on residence can be justified.

I. COLONIAL CHARTERS AND THE RIGHTS OF ENGLISHMEN

[A]ll and every the Persons being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies and Plantations, and every of their children, which shall happen to be born within any of the Limits and Precincts of the said several Colonies and Plantations, shall HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding

sparseness of debate on art. IV in Constitution or Articles of Confederation); R. HOWELL, *THE PRIVILEGES & IMMUNITIES OF STATE CITIZENSHIP* (1918) (art. IV traced to treatment afforded alien merchants in England); Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article IV*, 9 WM. & MARY L. REV. 1 (1967) (art. IV permits federal enforcement of natural rights); Comment, *The Interstate Privileges and Immunities: Fundamental Rights or Federalism*, 15 CAP. U.L. REV. 493 (1986) (fundamental rights analysis violates intent of Framers).

and born, within this our Realm of *England*, or any other of our said Dominions.⁸

The absence of prolonged public controversy over the adoption of the privileges and immunities clause in both the Articles of Confederation and the Constitution indicates that the principle was not an innovation. The Articles were drafted during the American Revolution; consequently, the clause's background must be sought in pre-revolutionary rights in colonies other than the colonists' own.⁹ Those rights flowed from political theory, express agreement and experience. The colonists had a common political tie to the King of England, colonial charters that expressly guaranteed them rights in other colonies, and practical experience of movement across the colonial boundaries.

A. *Subjects of a Common King*—Calvin's Case

The colonists, like all King's subjects, were free from alienage disabilities under English common law in English courts. Furthermore, the courts in the British colonies followed this common law principle and, therefore, colonists were free from the disabilities of alienage in the courts of other colonies. This principle was clearly stated in 1608, on the eve of colonization, when Lord Edward Coke and the English judges decided *Calvin's Case*.¹⁰ Under English law, aliens could not own real property in England. The question in *Calvin's Case* was whether one born in Scotland, after the Scottish King James had ascended the English throne, could inherit English land. Although England and Scotland had a common king, each had a separate parliament. Lord Coke held that persons subject to the same King could not be aliens to each other. "Lastly, whoso-

8. THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3788 (F. Thorpe ed. 1909) (citing the Virginia Charter of 1606) [hereinafter THORPE].

9. The Articles of Confederation brought in the rule that membership might be transferred from one state to another. While there is here doubtless the original expression of this character by the lawmaking body common to the new union, and is perhaps a new quality in federations, yet there must be taken into account the earlier common English citizenship of the great majority of the members of the Confederation, and the common rights that it involved. Those, whether continued or not throughout the preliminary states of their combination, must have done much to render intercitizenship in the federation inevitable. In other words, if here is a new character in federations, it is because this is a federation born out of conditions to which the new character was fundamental.

F. FRANKLIN, THE LEGISLATIVE HISTORY OF NATURALIZATION IN THE UNITED STATES: FROM THE REVOLUTIONARY WAR TO 1861, at 15-16 (1906).

10. W. SWINDLER, SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 68-93 (D. Musch ed. 1979) (ann. reprint of 2 WHARTON'S STATE TRIALS 607-58).

ever at his birth cannot be an alien to the king of England, cannot be an alien to any of his subjects of England."¹¹

Coke's reasoning applied to the colonists. Since they settled pursuant to a royal patent, they remained royal subjects. Under *Calvin's Case*, colonists could not be aliens under English law. That meant, however, only that persons born outside of England who were born subject to the King could still inherit property in England under its common law.

Calvin's Case did not limit the discretion of the King in the exercise of his prerogative or Parliament in the exercise of its power. Both could discriminate among subjects on the basis of place of birth. Indeed, early colonial trade laws did discriminate against Scottish traders.¹² Protection against such discrimination depended upon a commitment by the body with power to act. Since the Crown had authority to establish the laws in the colonies, colonists looked to the King for a commitment against discriminatory treatment when embarking upon the voyage to new lands.

B. *Charter Guarantees*

Charter provisions promised colonists the privileges, liberties, franchises and immunities of Englishmen in any of the King's colonies. Subsequently, the charter guarantees were used as a model for the privileges and immunities clause.

The first English settlements in North America were commercial ventures founded by individuals or companies operating under a patent granted by the Crown. The grant was a feudal relic which presumed foreign lands to be royal lands which the Crown could bestow to others. Sir Humphrey Gilbert received a grant for commercial activities in 1573, and Sir Walter Raleigh obtained a grant in 1584. Neither established a successful colony, but the documents supporting their efforts set the pattern for future charters.

In Gilbert's patent, Queen Elizabeth granted to every person born within her allegiance and those properly under the patent "the privileges of free denizens and persons native of England, and within our allegiance, any law, custome or usage to the contrary notwithstanding."¹³ The patent was an exercise of royal power: the

11. *Id.* at 90.

12. The acts of Union in 1707 by the parliaments of England and Scotland created the United Kingdom of Great Britain, "thereby admitting the Scots to partnership in overseas enterprises from which English policy had theretofore sought to exclude them." W. CRAVEN, *THE COLONIES IN TRANSITION 1660-1713*, at 313 (1968).

13. W. SWINDLER, *supra* note 10, at 61. The patent to Raleigh was similar: persons

bestowed "privileges" were tied to the nature and scope of the King's prerogative.¹⁴ The patent also gave Sir Humphrey the power to create and to administer the law. The grant of "privileges" to others implicated only limited civil rights, such as land ownership, and not political rights. The assurance that colonists would keep their English-law "privileges" encouraged emigration to America. While France and Spain deemed their colonists beyond the law because they were beyond the boundaries of the kingdom, English colonists kept the "liberties, franchises, and immunities" of the English at home.¹⁵

The first two colonies, Virginia and Massachusetts, were founded by joint stock companies possessing a royal charter. The Virginia Company charter provided:

[a]ll and every the Persons being our Subjects, which shall dwell and inhabit within every or any the said several Colonies and Plantations, and every of their children, which shall happen to be born within any of the Limits and Precincts of the said several Colonies and Plantations, shall HAVE and enjoy all Liberties, Franchises, and Immunities, within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born, within this our Realm of *England*, or any other of our said Dominions.¹⁶

Maryland's proprietary grant contained a similar "privileges, franchises and liberties" provision.¹⁷ Indeed, virtually every col-

"shall and may have all the privileges of free Denizens, and persons native of England, and within our allegiance in such like ample maner and fourme, as if they were borne and personally resident within our said Realme of England, any lawe, custome, or usage to the contrary notwithstanding." *Id.* at 65.

14. Denizens were aliens in England who were given special status by the King's prerogative. The status enabled the denizen to purchase and own, but not inherit, lands in England. Only Parliament could consent to a permanent transfer of real property to a person not born subject to the English King. J. KETTNER, *supra* note 7, at 30-31. The reference to denizens in this early patent as the measure of the privileges granted emphasizes the relationship between "privileges" and the prerogative. Most of the later charters purported to measure "liberties, privileges, franchises or immunities" by those enjoyed by the English, without reference to denizens.

15. These included trial by jury, benefit of clergy, and all the rights of possession and inheritance of land as in England. The new lands in America were legally a part of the king's demesne and were held as of a royal manor in England . . . in free and common socage, thus making it clear that though the new colonies might be outside the realm—as far as the payment of customs dues went and representation in parliament was concerned—they were within the realm in all that pertained to their legal and tenurial rights. Englishmen passing beyond the sea were Englishmen still, with an Englishmen's safeguards and restrictions.

C. ANDREWS, 1 *THE COLONIAL PERIOD OF AMERICAN HISTORY* 86 (1934).

16. 7 THORPE, *supra* note 8, at 3788 (citing Virginia Charter of 1606).

17. [L]ikewise all privileges, franchises and liberties of this our kingdom of England, freely, quietly, and peaceably to have and possess, and the same may use and

ony's charter provided that English subjects and their children who lived in the colony be treated as Englishmen.¹⁸ In most of the colonies, the original proprietary grant or company charter was surrendered to the King, who governed through royal governors. Colonists understood, however, that the "liberties, privileges, franchises and immunities" of England continued to apply under royal as well as proprietary or corporate governance.

These charter guarantees resemble the article IV provisions of the Constitution.¹⁹ Each secures to persons related to a local area

enjoy in the same manner as our liege-men born, or to be born within our said kingdom of England, without impediment, molestation, vexation, impeachment, or grievance of US, or any of our heirs or successors; any statute, act, ordinance or provision, to the contrary thereof notwithstanding.

1 LAWS OF MARYLAND 5 (V. Maxcy ed. 1811) [hereinafter LAWS] (citing Charter of Maryland).

18. J. KETTNER, *supra* note 7, at 65. The Charter of New England stated All and every the Persons, being our Subjects . . . shall have and enjoy all Liberties, and Ffranchizes, and Immunities of free Denizens and naturall Subjects within any of our other Dominions, to all Intents and Purposes, as if they had been abiding and born within this our Kingdome of England, or any other our Dominions.

3 THORPE, *supra* note 8, at 1839.

The Connecticut Charter of 1662 secured all subjects born in the province "all Liberties and Immunities of free and natural Subjects within any the Dominions of Us, Our Heirs or Successors, to all Intents, Constructions and Purposes whatsoever, as if they and every of them were born within the realm of *England*." 1 THORPE, *supra* note 8, at 533 (emphasis in original).

Rhode Island's Charter in 1663 contained nearly identical language securing "all libertyes and immunityes of ffree and naturall subjects within any the dominions of us . . . to all intents, constructions and purposes, whatsoever, as if they, and every of them, were borne within the realme of England." 6 THORPE, *supra* note 8, at 3220.

North Carolina's Charter in 1663 was explicit in providing for rights of property for persons born in that colony "as likewise all liberties, franchises and priviledges of this our kingdom of England, and of other our dominions aforesaid . . . as our liege people born within the same." 5 THORPE, *supra* note 8, at 2747.

Georgia's 1732 Charter was closer to the original phrasing of Virginia, promising that all persons born in the province "shall have and enjoy all liberties, franchises and immunities of free denizens and natural born subjects, within any of our dominions, to all intents and purposes as if abiding and born within this our kingdom of Great-Britain. or any other of our dominion." 2 THORPE, *supra* note 8, at 773.

19. First, "our Subjects, which shall dwell and inhabit within every or any the said several Colonies and Plantations," 7 THORPE, *supra* note 8, at 3788. is the charter equivalent of article IV's "the citizens of each state." U.S. CONST. art. IV, § 2, cl. 1. Both phrases refer to the people who lived in the colony and owed allegiance to the authority of that territory.

Second, the charter language "shall HAVE and enjoy all Liberties, Franchises and Immunities," 7 THORPE, *supra* note 8, at 3788, parallels the art. IV phrase "shall be entitled to all privileges and immunities." U.S. CONST. art. IV, § 2, cl. 1. Charter guarantees used various formulations for the guarantee, including "privileges," "liberties," "franchises," and "immunities."

Third, "as if they had been abiding and born within this our realm of England." 7 THORPE, *supra* note 8, at 3788, is the colonial counterpart to the constitutional phrase "of citizens." U.S. CONST. art. IV, § 2, cl. 1. Both phrases identify the standard for entitlement

(state or colony) a set of rights ("privileges or immunities") to be treated as a native throughout the territories (the several states or the dominions). The parallel structure and linguistic similarity between charter guarantees and article IV demonstrates that the framers were influenced in their choice of language by the charter model. The use of charter syntax indicates that the colonial charter experience had particular relevance to the article IV provisions.

C. *Liberties, Franchises, Privileges and Immunities*

The colonial charters never defined the "liberties," "franchises," "privileges," or "immunities" of persons born in England. These terms gathered meaning from their medieval past and subsequent events. The words originally denoted relief from feudal obligations. At most, the charter guarantees promised that the King would not overstep his prerogative within the royal demesne.

Developments in England and in the colonies led colonists to attribute new meaning to the charter provisions. They argued that the charters secured for the colonists the main features of the common law and the principles of English government. The colonists' interpretation served colonial political interests and did not always coincide with the British government's views. Ultimately, these charter-provision disputes became an integral part of the Revolution. Although the colonial view of the charter provisions was historically inaccurate, their interpretation was accepted by the drafters of the privileges and immunities clause for the Articles of Confederation and the Constitution.

1. *The Original Meaning of "Liberties," "Franchises," "Privileges" and "Immunities"*

The charter provisions on "liberties, franchises and immunities" may have had a limited technical meaning.²⁰ In feudal times, land was not individually owned but tenurially possessed in a hierarchical relationship of obligations owing all the way to the King.²¹

to privileges and immunities in terms of the most protected class within the political framework: natives of England under English rule and citizens under the Constitution.

Finally, the charters secure these rights "within any other of the king's dominions," 7 THORPE, *supra* note 8, at 3788, just as art. IV refers to enjoying them "in the several states." U.S. CONST. art IV, § 2, cl. 1.

20. "The words are to be taken literally, as meaning just what they were understood to mean in England at that time. They have nothing to do with civil liberty, self-government, or democracy; they were strictly legal, tenurial and financial in their application." C. ANDREWS, *supra* note 15, at 86 n.1.

21. See generally F. Maitland, CONSTITUTIONAL HISTORY OF ENGLAND 23-39

"Liberty" and "franchise" referred to specific relief from these obligations—a surrender by the Crown to the subject of the royal power to exact a burden.²² The surrender could take the form of nonexercise of the power or delegation of the power to another to exact the obligation.

Early "privileges" involved the purchase of relief from a tax or service obligation. By the end of the sixteenth century, feudalism had ended in England,²³ and privileges from feudal burdens could be generalized as privileges applicable to all persons in England. Therefore, the charter references to the liberties of Englishmen may have meant that the King's grant of rights to lands in America did not entail feudal obligations.

The charter terms may have had a broader meaning if derived from the corporate charters of English cities. There, "liberties" and "franchises" referred to the powers of city government to levy tolls or taxes or to protect inhabitants from being subject to obligations such as jury duty beyond the city limits.²⁴ The "liberties" of citizens in town charters anteceded the more general grant of privileges and immunities under the Magna Carta.²⁵ In this more general

(1955) (discussing the feudal land system); H. BENNETT, *LIFE ON THE ENGLISH MANOR: A STUDY OF PEASANT CONDITIONS 1150-1400*, at 97-150 (1960).

22. "Lastly, in our thirteenth century we learn that privileges and exceptional immunities are 'liberties' and 'franchises.' What is our definition of a liberty, a franchise? A portion of royal power in the hands of a subject." F. MAITLAND, *DOMESDAY BOOK AND BEYOND* 43 (1897).

23. Cf. E. EGGLESTON, *THE TRANSIT OF CIVILIZATION: FROM ENGLAND TO AMERICA IN THE SEVENTEENTH CENTURY* 294, 312-13 n.18 (1959) (using 1700 as the date ending feudal serfdom but admitting that authorities agree serfdom ended by 1450).

24. Know that we have granted and by our present charter have confirmed to our burgesses of Ipswich our borough of Ipswich, with all its appurtenances and with all its liberties and free customs, to be held of us and our heirs by them and their heirs in hereditary right.

Charter to Ipswich from King John in 1200, *reprinted in* C. STEPHENSON & F. MARCHAM, *SOURCES OF ENGLISH CONSTITUTIONAL HISTORY* 96 (1972). The corporate charter was originally a common form of town government. See H. HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870*, at 13-32 (1983). When commercial groups and explorers considered colonization, the corporate charter was the most convenient model to set forth their operating conditions. See J. SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS* 41-42 (1950). The result mixed commercial company trading charters and self government aspects of town charters. Subsequent colonies under direct royal control continued to use documents akin to old corporate ideas.

25. The Magna Carta was originally issued to a small group of barons but reissued many times by English kings subsequent to John. The class of those obtaining privileges under the document broadened to include all Englishmen. The grants of privileges to towns in medieval times shifted individual grants of privilege to communal grants.

Besides this general debt to the doctrines underlying municipal privilege the men of 1215 could acknowledge many detailed precedents to their demands in the borough

sense, the privileges, liberties, immunities, and freedoms might refer to all limits of the Crown's power. If so, the character of the charter guarantees was largely negative. The liberties, privileges, franchises or immunities involved surrender rather than exercise of royal power. They promised no legal protection to enforce rights against others. That was to come from the separate grant of power to the company or the proprietor to make laws approximating English law. Further, the charter guarantees offered no more protection from the prerogative than in England. When the first charters were drafted, the Crown laid claim to extensive prerogative powers: the King's power was at its height over his own lands, the King's demesne, and dominions beyond the realm were considered the King's demesne. The Virginia Company and New England charters were issued by King James I, who maintained a broad view of his power in England.²⁶ In short, the first charter provisions repudiated feudalism or, at most, promised that the Crown would not use its prerogative powers in the colonies to deprive subjects of life, liberty or property in ways impermissible in England.

No grant from the King limited the power of parliament; "liberties" were exemptions from royal power alone. Use of charter language to support the later colonial claim that parliament could not bind them was not based on original intent.

2. *Privileges and Immunities from Colonization to Revolution*

Developments in England and in the colonies during the century and a half of British rule radically affected the meaning that colonists gave to the charter guarantees. The seventeenth century was a watershed in the struggle between the King and Parliament for legal control.²⁷ The King, controlling the judges and appointing execu-

charters of the twelfth and thirteenth centuries. On mercantile questions this was obvious. Cap. 41 of the Charter was an amplification of the very common provisions in municipal charters concerning freedom to trade and free access to markets.

J.C. HOLT, *MAGNA CARTA* 49 (1965).

26. James asserted a theoretical absolutism but relied on precedent for exercises of power. See J.P. KENYON, *THE STUART CONSTITUTION 1603-1688*, at 8 (1966).

27. See H. NENNER, *BY COLOUR OF LAW: LEGAL CULTURE AND CONSTITUTIONAL POLITICS IN ENGLAND 1660-1689*, at ix-xii (1977).

It is unfortunate that an understanding of Stuart England is often confused by the erroneous supposition that law and prerogative were opposed, that, at the beginning of the century, law, in the person of Coke, is properly to be seen as the relentless adversary of the prerogative, in the person of James I It can, however, be argued that the seventeenth century makes greater sense, is rendered more intelligible, when the Stuarts and their parliaments are viewed in the context of a somewhat different constitutional struggle, a struggle which was not for the ascendancy of law but for the ascendancy of king or Parliament, and which was at all times circumscribed by law.

tive officers, was initially victorious, but Parliament ultimately gained control. Each advance of parliamentary power curbed royal prerogative. Therefore, if privileges and immunities were defined by limits on the prerogative, the privileges were expanded during the seventeenth century.

Finding Parliament difficult to deal with, King Charles I attempted to govern without it. The lack of finances forced the King to find new expedients for raising revenues, such as the ship money tax.²⁸ The courts upheld this exercise of the prerogative,²⁹ but it was insufficient. Forced to reconvene Parliament to obtain new revenues, Charles I was compelled to accede to measures limiting the prerogative, including one declaring the ship money levy illegal.³⁰ The King could not impose taxes without parliamentary consent.

Though Charles I was eventually beheaded and Oliver Cromwell ruled as Lord Protector, the struggle between King and Parliament continued throughout the century. Despite Charles II's Restoration creating the possibility of extending prerogative powers, parliamentary supremacy was assured by the "Glorious Revolution" of 1689 when William and Mary assumed the throne after deposing James II.

The battle for legislative supremacy in England was paralleled by the rise of local assemblies in colonial America. Each colony's legislative authority was vested in the King's representative or grantee. The corporate charters gave lawmaking power to the corporation. The proprietary grant to Lord Baltimore gave him the power to make laws "with the advice, assent and approbation of the free-men of the same province, or of the same province, or of the greater part of them, or of their delegates or deputies, whom WE

Id. at xi-xii.

28. Writ for the Collection of Ship Money (1634) in C. STEPHENSON & F. MARCHAM, *supra* note 24, at 455-56, citing 2 HISTORICAL COLLECTIONS 257 (J. Rushworth ed. 1721). The King could use his prerogative power over foreign affairs by demanding ships to equip his foreign military ventures. Charles levied a tax rather than ships.

29. The Question of Ship Money (1637) in C. STEPHENSON & F. MARCHAM, *supra* note 24, at 458-59, citing 3 STATE TRIALS 843 f (T.B. Howell ed. 1816-26) [hereinafter STATE TRIALS]; and The King v. John Hampden (1638) in C. STEPHENSON & F. MARCHAM, *supra*, at 459-62, citing STATE TRIALS, *supra*, at 1089-145.

30. [T]he said charge imposed upon the subject for the providing and furnishing of ships commonly called ship money . . . , and the said writs . . . and the said judgment given against the said John Hampden, were and are contrary to and against the laws and statutes of this realm, the right of property, the liberty of the subjects, former resolutions in parliament and the Petition of Right made in the third year of the reign of his majesty that now is.

Act Abolishing Ship Money (1641), reprinted in C. STEPHENSON & F. MARCHAM, *supra* note 24, at 4811-12, citing 5 STATUTES OF THE REALM 116.

will shall be called together for the framing of laws."³¹ Even royal colonies included power in the governor and council to enact laws. But government required cooperation by the populace, particularly to support taxation. As early as 1650, the Maryland General Assembly contended that no tax could be raised without its consent.³² As a result of such insistence, grants of power to limited bodies to enact local laws became anachronisms. Local assemblies made law in most colonies by the end of the seventeenth century.³³ The Crown's power to control domestic colonial law was effectively reduced to the same veto power it retained over acts of Parliament.³⁴

The autonomous local assembly transformed colonial views on the meaning of the charter provisions securing the liberties of Englishmen. Early colonists asserted that "rights liberties immunities privileges and free customs" are created by English common and statutory law, except as altered by the laws of the Province.³⁵ Colo-

31. 1 LAWS, *supra* note 17, at 3.

32. noe Subsidies ayde Customes taxes or impositions shall hereafter bee layde assessed, leavyed or imposed upon the freemen of this Province or on theire Merchandize Goods or Chattles without the Consent and Approbation of the freemen of this Province their Deputyes or the Major parte of them, first had and declared in a Generall Assembly of this Province.

I ARCHIVES OF MARYLAND 302 (W. Browne ed. 1883).

33. M. KAMMEN, DEPUTYES & LIBERTIES: THE ORIGINS OF REPRESENTATIVE GOVERNMENT IN COLONIAL AMERICA 57-58 (1969).

34. The King's or proprietor's colonial representative held a legislative veto power. The Board of Trade, Lord's Committee and Privy Council all had power to review colonial legislation, to disallow colonial laws and thereby to limit the power of local assemblies. See J. SMITH, *supra* note 24; G. WASHBURN, IMPERIAL CONTROL OF THE ADMINISTRATION OF JUSTICE IN THE THIRTEEN AMERICAN COLONIES 1684-1776 (1923). The power was not exercised against every departure from English practice, but laws which interfered with English colonial policy were inevitably stricken. The royal governor and the English Board of Trade could veto an unwise although not conflicting law. In the eighteenth century, about five percent of colonial laws were disallowed. J. BLUM, THE NATIONAL EXPERIENCE 50 (1968). See A. BASYE, THE LORDS COMMISSIONERS OF TRADE AND PLANTATIONS, 1748-1782 (1925); O. DICKERSON, AMERICAN COLONIAL GOVERNMENT, 1699-1765 (1912); L. LABOREE, ROYAL GOVERNMENT IN AMERICA; A STUDY OF THE BRITISH COLONIAL SYSTEM BEFORE 1783 (1930); E. RUSSELL, REVIEW OF AMERICAN COLONIAL LEGISLATION BY THE KING IN COUNCIL (1915). In the eighteenth century, a permitted law could still be appealed to the Privy Council as conflicting with English law. These appeals, although extremely rare, were precedents for the American judicial review doctrine. More commonly, claims were made in American Courts of common law rights, and a limited class of such cases could raise claims in the Privy Council that American court procedures violated rights of Englishmen. See G. WASHBURN, *supra*, at 184-89 (validity of colonial enactments discussed; *Withrop v. Lechmere* only case holding colonial enactment void; supplanted by *Clark v. Tousey*).

35. A statute was proposed in the Maryland General Assembly in 1639, yet never passed the house:

Be it Enacted By the Lord Proprietarie of this Province of and with the advice and approbation of the freemen of the same that all the Inhabitants of this Province

nial judges, appointed by the Crown or its local governors, turned to English common law as a familiar source of precedent. Grants of lawmaking power required some conformity to the common law. Almost every governing document granted to the proprietor, corporation, governor or council the power to make laws to govern the settlers "so always as the said statutes, laws, and ordinances may be as near as conveniently may be, agreeable to the form of the laws, statutes government or policy of England."³⁶ While no one believed that English common law and parliamentary enactments would categorically apply in America, the degree of their applicability in the colonies was a complex issue.³⁷ Nevertheless, English law to some extent applied until altered by local authorities. The charter language possibly guaranteed that the limits of the prerogative would be bounded by the law: the requirement that the government conform to English law created an expectation of the law's character which became an assertible right. The charter language of individual right used the words "privilege, franchise, liberties, or immunities." Colonists understood those terms to incorporate English law.

being Christians (Slaves excepted) Shall have and enjoy all such rights liberties immunities privileges and free customs within this Province as any naturall born subject of England hath or ought to have or enjoy in the realm of England by force or vertue of the common law or Statute Law of England (saving in such Cases as the same are or may be altered or changed by the Laws and ordinances of this Province).

And Shall not be imprisoned nor dissesied or dispossessed of their freehold goods or Chattels or be out Lawed Exiled or otherwise destroyed fore judged or punished then according to the Laws of this province saving to the Lord proprietarie and his heirs all his rights and prerogatives by reason of his domination and Seigniory over this Province and the people of the same.

I ARCHIVES OF MARYLAND, *supra* note 32, at 41.

The Secretary noted that a large number of bills, including this one, were never read nor passed the house, without explanation for the failure. Nevertheless, the general Bill for the Government of the Province that did pass in 1639 specified: "The Inhabitants of this Province shall have all their rights and liberties according to the great Charter of England." *Id.* at 83.

36. W. SWINDLER, *supra* note 10, at 65-66.

37. The reception of the common law varied in territories acquired by conquering a Christian king—where the existing law remained until replaced by positive exercises of the prerogative—and territories acquired by conquest of an infidel—where the King's law was immediately applicable. Acquisition of territory by settlement did not fit either category. J. SMITH, *supra* note 24, at 467. Colonial judges looked to English common law but often lacked legal training and access to English precedents. Local tailoring was unlikely to be reviewed given the small number of cases reviewed by English courts. The applicability of English statutes forced consideration of the type of parliamentary act (whether affirming common law or making new law); the statutory scope (whether general or particular); the date of enactment (whether prior to or after settlement); and the type of colony (proprietary, charter, or royal).

If the charter terms retained their meaning as limiting royal power, the common law was not intrinsically a privilege or immunity of a citizen but rather marked the prerogative's limit. If the laws and ordinances of the colony departed from the common law, such self government was no charter violation. Any threat to the privileges or immunities of the colony's people came only if the King or his grantee attempted to alter the common law by prerogative. By the American Revolution, the colonists had asserted the right to English statutory and common law appropriate for colonial circumstances.

A selective "right" to desired laws without being bound by undesired ones originated in the negative character of "privileges and immunities." English law defined the extent of the prerogative in England and was thus a "privilege or immunity" of an Englishman. The King's colonial prerogative was no greater than in England, but the law applicable to colonists beyond the prerogative could be locally derived. Thus, only the English common law and statutes found desirable by the colonists were colonial "privileges"; the rest were locally defined.

England acknowledged that the colonists should be treated as British subjects.³⁸ As Parliament prevailed as the primary governmental force, the right of British subjects was to have parliamentary law apply through proper procedures. Colonists responded that local assemblies in the colonies were the equivalent of Parliament. Having identified charter guarantees with English law, the colonists contended that the charters required conformity with the principles of English government.³⁹ They claimed that the nature of English

38. For the Crown, an interpretation of "privileges, liberties and immunities" as a grant of government protection of individual rights supported the exercise of royal power over the governance of the colony. At this early date, the Crown controlled foreign relations. The rights and duties of English subjects in foreign lands came within the King's prerogative. Thus, the clause could mean that the colonist was entitled to appeal to the King, not for any specific legal right, but for protection like any Englishman in a foreign land. The King decided what kind of protection should be afforded. See J. SMITH, *supra* note 24, at 42, 74-75, 140-45. This interpretation of the clause strengthened the King's claim to control the colonial government. Even if the clause secured substantive legal rights to colonists, it provided for royal supervision of colonial affairs.

39. This declaration [the liberties and immunities clause of the Connecticut charter] and confirmation denotes and imports (as is conceived) that all those general and essential rights which the free and natural subjects in the mother country are possessed of and vested with by virtue of the main, leading, and fundamental principles of the common law or constitution of the realm, the King's subjects in the said colony of Connecticut shall have and enjoy.

Fitch, *Reasons Why the British Colonies In America Should Not Be Charged With Internal Taxes* (1764), reprinted in B. BAILYN, *PAMPHLETS OF THE AMERICAN REVOLUTION 1750-*

subjects' rights was to be governed by their own representatives, that Americans had no representation in Parliament, and that consequently, laws made by Parliament for the colonies violated their rights. Further, restrictive laws affecting the colonies differently than England were challenged as violations of English liberties.

On May 30, 1765, the Virginia House of Burgesses claimed that the Stamp Act violated the rights of Englishmen—rights both inherent in subjects of the King and granted specifically by charter.⁴⁰ The "rights" claimed were limits on government. The nature of "privileges and immunities" by now, however, had clearly changed from limits on the prerogative to limits on any exercise of power by any sector of English government.

On October 14, 1774, the First Continental Congress issued a Declaration and Resolves that stated an even broader view of the rights of Americans, claiming rights by the law of nature as well as under the principles of the English Constitution and the colonial

1776, at 386, 390 (1965) (fundamental principle is that laws cannot be made or abrogated without popular consent).

40. *Resolved*, That the first adventurers and settlers of this His Majesty's Colony and Dominion of Virginia brought with them, and transmitted to their posterity, and all other His Majesty's subjects since inhabiting in this His Majesty's said Colony, all the liberties, privileges, franchises, and immunities that have at any time been held, enjoyed, and possessed, by the people of Great Britain.

Resolved, That by two royal charters, granted by King James the First, the colonists aforesaid are declared entitled to all liberties, privileges, and immunities of denizens and natural subjects, to all intents and purposes, as if they have been abiding and born within the realm of England.

Resolved, That the taxation of the people by themselves, or by persons chosen by themselves to represent them, who can only know what taxes the people are able to bear, or the easiest method of raising them, and must themselves be affected by every tax laid on the people, is the only security against a burdensome taxation, and the distinguishing characteristic of British freedom, without which the ancient constitution cannot exist.

Resolved, That his Majesty's liege people of this his most ancient and loyal Colony have without interruption enjoyed the inestimable right of being governed by such laws, respecting their internal polity and taxation, as are derived from their own consent, with the approbation of their sovereign, or his substitute; and that the same hath never been forfeited or yielded up, but hath been constantly recognized by the kings and people of Great Britain.

Resolved therefore, That the General Assembly of this Colony have the only and sole exclusive right and power to lay taxes and impositions upon the inhabitants of this Colony, and that every attempt to vest such power in any person or persons whatsoever other than the General Assembly aforesaid has a manifest tendency to destroy British as well as American freedom. . . .

SOURCES & DOCUMENTS ILLUSTRATING THE AMERICAN REVOLUTION 1764-1788 AND THE FORMATION OF THE FEDERAL CONSTITUTION 17-18 (S. Morison ed. 1929) [hereinafter SOURCES] *citing* JOURNALS OF THE HOUSE OF BURGESSES OF VIRGINIA, 1761-65 (J. Kennedy ed. 1907) (last resolution rescinded although published in other colonies as though passed).

charters.⁴¹ In article 5 they claimed the right to the common law, including trial by jury; in article 6 the Congress asserted the colonists' right to the English statutes which they found applicable to their own situation; and in article 7 they asserted the right to the

41. That the inhabitants of the English Colonies in North America, by the immutable laws of nature, the principles of the English Constitution, and the several charters or compacts, have the following rights:

1. That they are entitled to life, liberty, and property, and they have never ceded to any sovereign power whatever, a right to dispose of either without their consent.

2. That our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects within the realm of England.

3. That by such emigration they by no means forfeited, surrendered, or lost any of those rights, but that they were, and their descendants now are entitled to the exercise and enjoyment of all such of them, as their local and other circumstances enable them to exercise and enjoy.

4. That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented, and from their local and other circumstances, cannot properly be represented in the British Parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed. But, from the necessity of the case, and a regard to the mutual interest of both countries, we cheerfully consent to the operation of such Acts of the British Parliament, as are bona fide restrained to the regulation of our external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members; excluding every idea of taxation, internal or external, for raising a revenue on the subjects in America without their consent.

5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.

6. That they are entitled to the benefit of such of the English statutes, as existed at the time of their colonization; and which they have, by experience, respectively found to be applicable to their several local and other circumstances.

7. That these, His Majesty's Colonies, are likewise entitled to all the immunities and privileges granted and confirmed to them by royal charters, or secured by their several codes of provincial laws.

8. That they have a right to peaceably assemble, consider of their grievances, and petition the king; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal.

9. That the keeping a standing army in these colonies, in times of peace, without the consent of the legislature of that colony in which such army is kept, is against law.

10. It is indispensably necessary to good government, and rendered essential by the English Constitution, that the constituent branches of the legislature be rendered independent of each other; that, therefore, the exercise of legislative power in several colonies, by a council appointed during pleasure, by the Crown, is unconstitutional, dangerous, and destructive to the freedom of American legislation.

All and each of which the aforesaid deputies, in behalf of themselves, and their constituents, do claim, demand, and insist on, as their indubitable rights and liberties; which cannot be legally taken from them, altered or abridged by any power whatever, without their own consent, by their representatives in their several provincial legislatures.

"privileges and immunities" granted by the charters or secured by provincial codes. The separate article for "privileges and immunities" suggests that colonists still regarded the phrase as applicable only to limits on government authority and not as establishing positive law as in the common law, the statutes or provincial codes. Nevertheless, the Declaration indicates that the charter guarantees merely confirmed rights applicable to the colonists from the principles of English government which in turn reflected natural law. While they were still subjects of the King, the colonists rested their claims primarily on rights identified within the existing English legal system—the common law, the English statute, and the charter provision or provincial code. Natural law was a supplementary basis for the claim of a "privilege or immunity" found in existing legal structures.

On the eve of the American Revolution, the "liberties," "franchises," "privileges," and "immunities" in colonial charters had developed new meanings. They were identified with the basic principles the colonists found in English government, especially the political principle of representative government.

D. *The Rights of Englishmen in Other Dominions of the King*

One of the basic principles of English government was the common status of all subjects of the King, confirmed in *Calvin's Case*. There was little discussion in the polemical writings on the eve of the Revolution of the rights of colonists in other dominions of the King. That was not in contention. Nevertheless, the charter provisions invoked to resist England had their clearest application to intercolonial rights.

Historians have viewed the charter phrases as a reference to the transportation of rights: colonists carry with them to the new world and transmit to their children the same "privileges, franchises, liberties and immunities" as had they remained in England.⁴² But the crucial liberty claimed in 1776 was the right to be bound only by laws to which the colonists had consented through their representative. The law varied from colony to colony; no one thought colonists took the law of their colony with them when leaving its jurisdiction. The early Virginia and Massachusetts charters referred to liberties as if the colonists had been "abiding and born within this kingdom of England" but had added "or any other of

42. See, e.g., C. ANDREWS, *supra* note 15; A. HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 15-23 (1968).

our Dominions." Similar clauses in later charters made no reference to the privileges of persons abiding in England but only to privileges or immunities as if born in England. These privileges were secured not just in the province for which the charter was given but in "any of our dominions." Consequently, this language required the determination of the rights of an Englishman in the other dominions of the King.

The content of the guarantees might be deduced from the rights a colonist from one colony was actually afforded in a second colony. Since the natives of the second colony presumably received their charter liberties, the limits of the charter guarantee may be derived from permissible discrimination against persons from other colonies. Further, since the colonial charters and the privileges and immunities clause of both the Articles of Confederation and the Constitution specify that privileges and immunities apply across boundary lines, the colonists relied on the experience of intercolonial recognition of British nationality to understand their rights. Curiously, few studies have traced the development of intercolonial rights, yet this issue is important for understanding the background of the Constitution.

1. *Intercolonial Movement*

Immigration from England and intercolonial migration occurred throughout the colonial period. The common allegiance to the King meant that the colonist could travel to England or other colonies as freely as the English subject who lived in England. The right to travel was an established English liberty since the Magna Carta.⁴³ Even the Navigation Acts of 1660 restricting American trade treated colonial and English shipping alike, excluding only alien ship trade.⁴⁴

The English subject's right to travel, however, was restricted by concern for religion, the protection of creditors, and the provision of welfare. During early English settlement, a religious oath requirement restricted emigration from England. Within the colonies, local creditors feared servants and debtors would leave the colony to escape their obligations. Even where individuals could freely leave a community, they might be excluded from other com-

43. A. HOWARD, *supra* note 42, at 214. The Magna Carta guarantee protecting freedom of movement of foreign merchants became a similar guarantee for natives. J.C. HOLT, *supra* note 25, at 11-12.

44. 7 STATUTES AT LARGE 452-60 (D. Pickering ed. 1763). An Act for the encouraging and increasing of shipping and navigation. W. SWINDLER, *supra* note 10, at 116-24.

munities for religious or poverty reasons. One important question for investigation is the extent to which freedom of movement existed when the Revolution began.

The feudal system bound the serf to the lord's land. With the demise of the feudal system, people could move around the English countryside in search of work. English "poor laws," however, required an individual's parish to provide support until the individual obtained "settlement" in another location.⁴⁵ The power of local jurisdictions to return persons to the parish where they had settled helped confine individuals to their birth area. Compared to feudalism, there was considerable freedom of movement, but restrictions continued to confine.

The Act of Settlement discouraged migration within England but had a less significant impact on migration to the colonies. The need for labor made the colonies eager to receive people rather than to erect local barriers to avoid potential liability. The costs of transatlantic travel assured that the passenger had money and would be welcomed, or could fill needs for labor so that an indenture could be made. The eagerness for new workers led to another movement restriction: some locations in England required registration of indentures before the emigrant left the country as a means of discouraging kidnapping.⁴⁶

Once in the colonies, travel was restricted by various "pass laws" adopted to prevent servants from escaping from service and to enable masters to enforce the indenture term.⁴⁷ Early laws required all persons who traveled to obtain a pass.⁴⁸ These statutes

45. The Settlement Act of 1662 provided:

that any newcomer to a parish could be returned within 40 days to the parish where he was last legally settled, whether or not he applied for relief or was likely to do so. To avoid such expulsion, the individual could provide security or pay an exorbitant rent (£10), far beyond the ability of most (90%) of the population. The result was the legal restriction of all people without substantial wealth or property to the area in which they were born.

P. DODYK, M. SOVERN, C. BERGER, W. YOUNG, & M. PAULSON, *LAW AND POVERTY: CASES AND MATERIALS* 112 (1969).

46. D. GALENSON, *WHITE SERVITUDE IN COLONIAL AMERICA 183-84* (1981) (Bristol registrations).

47. *Id.* at 8, citing A. SMITH, *COLONISTS IN BONDAGE: WHITE SERVITUDE AND CONVICT LABOR IN AMERICA 1607-1776*, at 264-70 (1947).

48. MARYLAND LAWS, 1715, Ch. XIX: "An ACT prohibiting all masters of ships or vessels, or any other person, from transporting or conveying away any person or persons out of this province without passes." The original source for this law was MARYLAND LAWS, 1704, Ch. XXII (subsequent enactments, e.g. MARYLAND LAWS, 1753, Ch. IX, apply only to servants and slaves).

LAWS OF VIRGINIA, SEPT. 1632, Act LVI: "It is ordered, That no person or persons shall depart out of this colony to inhabite or abide within any other plantations, of New-England

assured creditors that their debtors would not leave the province without giving security to assure debt payment. Nevertheless, by the middle of the eighteenth century, the colonial laws restricted only those persons bound to service from emigration.

The colonial welcome for the indentured servant did not always extend to that person beyond the term of indenture. The unemployed and unemployable began to pose community problems. The colonies, following England, adopted settlement laws for local jurisdictions to exclude nonresidents in order to prevent welfare claims.⁴⁹ The statutes did not restrict travel but prevented indigents from staying in a new town. The trader with resources was unaffected by these laws which reflected community anxiety to avoid welfare burdens for the poor.

Religious intolerance posed another restriction on travel. During religious strife in England, emigrants took an oath of loyalty to the King before leaving England. The structure of the oath could not conscientiously be followed by certain sects; therefore, religion curbed English migration and limited immigration to the colonies. Individuals not conforming to the dominant religion might be refused settlement rights and driven from the area. The "poor" laws and religious intolerance restrictions, while fencing people out, for the most part did not prevent people from leaving. With so much unsettled territory, a continued stream of migration flowed from one colony to another, especially to the west.⁵⁰

The Rhode Island charter in 1663 entitled inhabitants of Rhode Island towns to free movement for lawful purposes through any other of the king's dominions.⁵¹ Even without specific charter assurances, freedom of movement was common in practice.⁵² Colo-

or elsewhere, unlesse he obteyne a lycense or passe for his departure under the Governor's hand." See LAWS OF VIRGINIA, MARCH 1643, Act. II (prohibiting persons from transporting persons from the colony without a pass and requiring the posting of security for debts as a condition of getting the pass); LAWS OF VIRGINIA, MARCH 1657, Act XII (prohibiting masters of vessels from transporting any person out of the colony without a pass); LAWS OF VIRGINIA, MARCH 1658, Act LXVIII (requiring a pass to be obtained to move to the Chesapeake Bay).

49. S. Mencher, POOR LAW TO POVERTY PROGRAM 39-41 (1967); W. TRATTNER, A HISTORY OF SOCIAL WELFARE IN AMERICA 20-23 (3d ed. 1984).

50. On the heavy amount of emigration among freedmen in the Chesapeake, see Carr & Menard, *Immigration and Opportunity: The Freedman in Early Colonial Maryland*, in THE CHESAPEAKE IN THE SEVENTEENTH CENTURY: ESSAYS ON ANGLO-AMERICAN SOCIETY 206, 236 (T. Tate & D. Ammerman eds. 1979) [hereinafter CHESAPEAKE].

51. W. CRAVEN, *supra* note 12, at 54-55; See THORPE, *supra* note 8, at 3212-13.

52. See P. FINKELMAN, AN IMPERFECT UNION 31 (1981). (Under British rule American colonists guaranteed freedom of movement by virtue of imperial citizenship.).

nial law did not keep individuals in their home area unless fleeing from a service obligation. Although the unemployed and unpropertied migrant might be excluded from living in new areas, the exclusion related to the economic conditions of each area and was not usually colony wide.

2. *Acquisition of Citizenship by Residence*

A second question for further study is the extent to which colonists could acquire the rights of natives of another province by residing there. To the British, the colonies were dependent governments. A Virginia colonist was not a citizen of an independent state but an English subject inhabiting Virginia. Local assemblies could exercise delegated authority to proscribe local community rules, but community membership was a consequence of living there.

"Foreigners" were distinguished from British natives of other colonies. New Hampshire, Pennsylvania, North Carolina and Delaware excluded "foreigners" from voting by statute, and other colonies customarily excluded non-British subjects.⁵³

A number of provinces also established voting residence requirements although such laws did not exist in England. "In Georgia and North Carolina, a six month minimum was established, in South Carolina, one year, while in Pennsylvania and Delaware it was two years."⁵⁴ However, New York and Virginia had no residence requirement. An individual moving there from another province immediately became a full community member entitled to vote for the legislature if he met all the other voting requirements.⁵⁵

In some colonies, residence requirements excluded newcomers from opportunities available to natives. As a native population developed, the colonists resisted the imposition of English officials. The Crown retained the power to appoint colonial officials and generally reserved those positions as rewards for English supporters. Concerned that outsiders would come to the colony to reap its profits without becoming part of its life, colonists imposed durational residency requirements for holding public offices. Local ordinances excluded newcomers from offices except by immediate commission from the Crown.⁵⁶

53. R. DINKIN, *VOTING IN PROVINCIAL AMERICA: A STUDY OF ELECTIONS IN THE THIRTEEN COLONIES, 1689-1776*, at 34 (1977).

54. *Id.* at 35.

55. *Id.*

56. XIX ARCHIVES OF MARYLAND, *supra* note 32, at 100-01; XXVI ARCHIVES OF

Other barriers to community membership existed for an immigrating nonresident. Community "poor laws" within a colony could prevent an individual from settling there. The "poor law" concept of settlement could create durational residency requirements for the exercise of other rights. Until a community accepted an individual, real residence was not established. Acceptance into a community was a local authority rather than colonial issue because support obligations were local. One achieving "settlement" in an area was entitled to civil and political rights available to long-time residents.

Aside from these restrictions,⁵⁷ the colonial concern focused on inclusion rather than exclusion. Colonies encouraged immigration by assuring foreigners of property and contract rights. They held out the promise of colonial law naturalization, but England would never accept colonial naturalization as being equivalent to parliamentary naturalization. Under English law, an alien naturalized under Massachusetts law was an alien and treated as one throughout English dominions. Indeed, one of the charges against King George in the Declaration of Independence was that "He has endeavored to prevent the population of these states; for that purpose obstructing the laws for naturalization of foreigners; refusing to pass others to encourage their migrations hither & raising the conditions of new appropriations of lands."⁵⁸

English law was concerned only with colonial attempts to naturalize foreigners. Individuals born in England or a colony were not naturalized because they were already English subjects. Thus, although colonies enacted special naturalization procedures to assure foreigners of rights held by natives, no such procedure applied to the King's colonial subjects. The Crown wanted to facilitate acceptance. If colonists had restricted English immigration, England would have disallowed their laws. Thus, in practice, a Virginian became a New Yorker simply by moving there and waiting to become a full community member.

MARYLAND, *id.* at 429-30. See also Jordan, *Political Stability and the Emergence of a Native Elite in Maryland*, in CHESAPEAKE, *supra* note 50, at 243, 271-72; Shammas, *English-Born and Creole Elites in Turn-of-the-Century Virginia*, in CHESAPEAKE, *id.* at 274, 291-92 (similar Virginia laws).

57. Religious theocracy in New England during the seventeenth century also precluded a stranger from becoming a true community member—a church member. It played a lesser role in excluding residents during the eighteenth century as a more secular political structure developed.

58. The Declaration of Independence para. 10 (U.S. 1776).

3. *Nondiscrimination against Nonresidents*

The colonist was also protected against discrimination when visiting or trading in a colony. The colonist who visited England or had property interests there received the same legal treatment as Englishmen. Unlike aliens, colonists retained rights to own real property and to file suit in English courts. Hamilton wrote in *The Federalist Papers* on the need for a single nation and cited the colonial free trade to buttress his point. States in isolation would pursue different commercial policies and cause:

distinctions, preferences, and exclusions, which would beget discontent. The habits of intercourse, on the basis of equal privileges, to which we have been accustomed since the earliest settlement of the country would give a keener edge to those causes of discontent than they would naturally have independent of this circumstance.⁵⁹

The English allegiance preventing the colonist from being treated as an alien in other colonies did not prohibit laws distinguishing between residents and nonresidents. The nonresident posed greater colonial control problems; consequently, legislation dealt with the possibility that a nonresident would not remain in the colony. Maryland had different rules for attachment of resident and nonresident property.⁶⁰ Residents were permitted to sue without an attorney, while nonresidents were required to have one.⁶¹ Special procedures were enacted for nonresidents to acknowledge conveyances.⁶² These regulations were directed at locating and asserting jurisdiction over the nonresident and did not reflect antagonism toward the nonresident status.

An individual's right to treatment within another colony as a common subject of the King did not prohibit all restrictive intercolonial trade law. The Navigation Acts prevented colonists from trading specified goods directly with foreign nations, requiring goods to be shipped first to England. Colonies occasionally barred importation of goods from other colonies. For example, in 1715 Maryland prohibited the importation of bread, beer, flour, malt, wheat or other grain or tobacco from Pennsylvania or any other

59. THE FEDERALIST No. 7, at 62-63 (A. Hamilton) (C. Rossiter ed. 1961) (background of intercolonial freedom of trade would make trade barriers established by separate states difficult to tolerate: "We should be ready to denominate injuries those things which were in reality the justifiable acts of independent sovereignties consulting a distinct interest." *Id.*).

60. MARYLAND LAWS, 1715, ch. 40, § 2-3.

61. MARYLAND LAWS, 1716, ch. 20.

62. MARYLAND LAWS, 1776, ch. 14, § 4.

colony.⁶³ Trade barriers assisted local producers at the expense of other colonies, but the laws turned on the goods' location and not the trader's residence. Colonial power to enact protectionist legislation was nonetheless limited, because England would not tolerate commercial interference affecting its trade.⁶⁴

II. THE ARTICLES OF CONFEDERATION

In the fourth article of the Confederation, it is declared "that the *free inhabitants* of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of *free citizens* in the several States; and the *people* of each State shall, in every other, enjoy all the privileges of trade and commerce," etc. There is a confusion of language here which is remarkable. Why the terms *free inhabitants* are used in one part of the article, *free citizens* in another, and *people* in another; or what was meant by superadding to "all privileges and immunities of free citizens," "all the privileges of trade and commerce," cannot easily be determined.⁶⁵

Prior to declaring independence, each colony regarded itself as a separate dominion headed by a common King. Under the various charters, the King had promised colonial subjects entitlement to the same liberties, privileges, franchises, and immunities in every other colony as if born in England or that colony. As British subjects, colonists had rights to travel, to become members of another colony by moving there, and to be free of discrimination in trade, property ownership and other legal rights in other colonies. However independent, colonial governments were required to recognize their common link with other colonies through the King. Discrimination against nonresidents paled in comparison to restrictions on foreigners or to the past.

Independence broke the link with the King and undercut the requirement that persons from other colonies be treated as common subjects, not aliens. Unless some provision was made, each state could discriminate freely against people from other states. Thus, the privileges and immunities clause of the Articles of Confederation grew out of the need to restore the common nationality and intercolonial rights that existed before independence.

63. THE LAWS OF THE PROVINCE OF MARYLAND 82-83 (E. Jones ed. 1718).

64. See C. ANDREWS, THE COLONIAL BACKGROUND OF THE AMERICAN REVOLUTION 50 (1931).

65. THE FEDERALIST No. 42, at 270 (J. Madison) (J. Cooke ed. 1961).

A. *Dickinson's Initial Proposal*

During the move toward independence, the Continental Congress established two committees: the first was to compile a statement, drafted by Thomas Jefferson, explaining the reasons for the breach with the mother country, and the second was to establish a governmental framework. The latter committee reported a draft of articles of confederation, largely by John Dickinson of Pennsylvania, on July 12, 1776. Dickinson proposed two articles to address potential discrimination against citizens of other states:

Article VI: The Inhabitants of each Colony shall henceforth always enjoy the same Rights, Liberties, Privileges, Immunities and Advantages, in the other Colonies, which the said Inhabitants now have, in all Cases whatever, except in those provided for by the next following Article.

Article VII: The Inhabitants of each Colony shall enjoy all the Rights, Liberties, Privileges, Immunities and Advantages, in Trade, Navigation and Commerce in any other Colony, and in going to and from the same from and to any Part of the World, which the Natives of such Colony enjoy.⁶⁶

Article VI on its face attempted to preserve the prerevolutionary intercolonial privilege of the King's subjects under the new government. Indeed, Dickinson used "inhabitants of each colony." Article VII used a different mechanism to protect intercolonial rights of movement and commerce. Instead of preserving the status quo, it used the colonial charter technique of measuring intercolonial rights by the rights of natives of the colony. Both provisions used positive law standards without reference to natural law principles.

The August 1776 revised draft articles omitted both provisions.⁶⁷ No record of any discussion of the omission exists, but the flaws of article VI may have been the cause. It prevented any alteration of noncommercial state law affecting residents of other states, even if nondiscriminatory against nonresidents. Article VII may have been dropped because it was tied to Article VI as an exception.

The Dickinson draft raised the intercolonial rights issue under Crown experience. The articles, although omitted, addressed a state's obligations to persons from another state. The rejection of the first draft's inartful approach simply postponed resolution.

B. *Committee Draft Proposals*

The Revolutionary War pushed aside the Articles of Confedera-

66. 5 JOURNALS, *supra* note 1, at 547 (W. Ford ed. 1906).

67. *Id.* at 676.

tion consideration. A year later, the Continental Congress was still debating it. In November 1777, with many delegates away, a committee considered new articles to be added to the draft. One article elaborated on the Dickinson draft. Several forms of the proposed committee article have survived.⁶⁸ One early draft [hereinafter Draft A] provided that:

5. And for the more certain preservation of friendship and mutual intercourse between the people of the different States in this Union, the Citizens of every State, going to reside in another State, Shall be entitled to all the rights and privileges of the natural born free Citizens of the State to which they go to reside; and the people of each State Shall have free egress and regress for their persons and property to and from every other State, without hindrance, molestation or imposition of any kind. Provided, that if Merchandize of any sort be imported for the purposes of traffick within any State, that the person So importing Shall be liable to the Same imposts and duties as the people of the State are by law liable to where Such importations are made, and none other. And provided also that the benefit of this Article Shall extend to the property of the United States, and of any particular State, in the Same manner as to the property of an Individual in any State.

The first clause of this draft sets forth the privilege of becoming a citizen of a second state by moving to it. The second clause secures the right of free travel and residence. The broad protection of movement is limited only by taxation of goods imported for trade on the same basis that residents must pay.

The final committee draft also drew on another early draft [hereinafter Draft B].⁶⁹

And the better to secure and perpetuate mutual Friendship and Intercourse between the People of the different States in this Union, ~~Agreed—that,~~ The free Inhabitants of each of these States, Paupers Vagabonds and fugitives excepted, shall be entitled to all Privileges and Immunities of free Citizens in ~~all and every of said the respective States (saving to the Inhabitants of the respective States the Admission of their own Inhabitants and the Sole Management of their own municipal Affairs).~~ And the People of each State shall have free Ingress and Egress for their Persons and Property to and from every other State, to trade and traffick, without any Hindrance or Imposition of any Kind whatsoever, provided that if any Merchandise or Commodity be imported into any State for the purpose of Traffick therein, the Person so importing shall be liable to the same Imposts and Du-

68. 9 JOURNALS, *supra* note 1, at 888 (W. Ford ed. 1907) (footnotes omitted).

69. *Id.* (Overstruck text indicates original draft deletion.)

ties as the People of the State are by Law liable to where such Importations are made and none other, provided also that the Benefit of this Article shall Extend to the property of the United States and of any particular State in the same Manner as to the property of an Individual.

The sense of Draft B is less clear than Draft A. The first sentence appears to assure inhabitants of one state the privileges and immunities of free citizens in other states, whether to reside, trade or visit. The exception for paupers, vagabonds, and fugitives suggests that the drafters focused on the rights of persons attempting to change residence, for members of these groups could be returned to their place of origin. The deletion of the clause that reserved to state inhabitants control over the admission of inhabitants and the management of municipal affairs could signify the drafters' rejection of state power. More likely, the drafters' limit of the rights of ingress and egress to travel for trade and traffic was designed to allow states to exclude persons who wished to change residence or to exercise non-trade or traffic rights. The draft secured citizenship by change of residence for residents and secured the privileges and immunities affiliated with trade and commerce for nonresidents.

The two drafts were merged by the Committee into a new draft submitted to Congress.⁷⁰

5. And [the better to secure and perpetuate mutual] friendship and intercourse between the people of the different States in this Union, the Inhabitants of every State [Paupers Vagabonds and fugitives from Justice excepted] going to reside in another State shall be entitled to all the rights and privileges of the natural born free Citizens of the State to which they go to reside: And the people of each State shall have free [Ingress and Egress] for their persons and property to and from every other state without hinderance, or imposition of any kind, Provided that if Merchandise be imported [into any State] for purpose of trafficking therein, the person so importing shall be liable to the same imposts and duties as the people of the State are by law liable to where such importations are made, and none other, And provided also that the benefit of this article shall extend to the property of the United States, and of any particular State, in the same manner as to the property of an Individual.

This second draft article had the same clarity of Draft A that the "rights and privileges" of "natural born free citizens" were secured only for inhabitants of a state who went to a second state to reside. However, the Draft A language had been too inclusive. "Paupers, vagabonds and fugitives" were frequently forced under

70. *Id.* at 889. (Words in brackets show insertions by James Duane or Richard Law.)

colonial laws to return to their place of origin. As persons subject to expulsion, they were not entitled to the privileges and immunities of free citizens. Thus, the committee adopted the Draft B exemption language. With the exclusion of paupers, vagabonds and fugitives from the right to acquire citizenship in another state, most serious state objections were eliminated.

The drafters left no reason for choosing "inhabitant" (Draft B) rather than "citizen" (Draft A) to describe the protected class. "Inhabitant" may have conformed with the usage in earlier claims to colonial privileges and immunities. For example, the claim of rights as English subjects in the Declaration and Resolves of the First Continental Congress was stated on behalf of the colonial "inhabitants." Even Dickinson's 1776 draft articles used the term. The prerevolutionary colonists considered themselves the King's colonial subjects. They had not been colonial "citizens" in the same manner that they later became United States "citizens," because colonial naturalization powers were in debate with England. In early independence, the more familiar term was used. Further, "free inhabitants" and "citizen" may have been interchangeable because of the peculiar revolutionary American situation. The colonists were British subjects prior to 1776. With independence, colonists could maintain their British nationality by leaving. The decision to remain in the states was considered an acceptance of the new government's protection and created a bond of allegiance. State citizenship was a choice of residence, not birth. Thus, "inhabitant" and "citizen" were effectively coterminous.⁷¹

Madison later chastized the use of "free inhabitants" in the Articles of Confederation.

It seems to be a construction scarcely avoidable, however, that those who come under the denomination of *free inhabitants* of a State, although not citizens of such State, are entitled, in every other State, to all the privileges of *free citizens* of the latter; that is, to greater privileges than they may be entitled to in their own state.⁷²

Even if "inhabitant" and "citizen" were synonymous under the Articles, the lack of a uniform naturalization power could lead to enabling aliens to acquire citizenship in one state in order to obtain

71. G. BANCROFT, 5 HISTORY OF THE UNITED STATES OF AMERICA, 200 (1883) cited in F. FRANKLIN, THE LEGISLATIVE HISTORY OF NATURALIZATION IN THE UNITED STATES 5 (1906).

72. THE FEDERALIST NO. 42, at 270 (J. Madison) (J. Cooke ed. 1961).

the rights of citizenship in a second state where they would otherwise be ineligible.

As Madison posited, the Articles of Confederation language may have resulted from careless drafting through the reliance on familiar terms, ignorant of the need for reexamination in a new context. Alternatively, "inhabitant" may have been more limited than "citizen" in this context. Its choice may have been designed to eliminate the problem causing Madison to disparage article IV, since it had been used earlier as synonymous with "subjects of the King inhabiting the colony" and did not apply to alien residents or other European persons whose colonial legislative naturalization was not recognized in England.⁷³ A decade after the revolution when Madison wrote *The Federalist*, "inhabitant" had probably lost its original common implication of a "British subject inhabiting the colony;" inhabitants were no longer British subjects. On the other hand, "citizen" reflected the political sense of self-government and was now the more common usage.

The committee draft provided for the freedom of interstate movement for all persons. Draft B had only protected interstate movement "to trade and traffick" which limited the impact of a broadly drafted privileges and immunities clause. The narrower scope of the committee draft rights and privileges clause eliminated the need to limit rights of interstate movement to commercial behavior. The apparent elimination of the right to exclude undesirable citizens of other states was acceptable because the most undesirable persons were excepted.

The committee draft included the Draft A and Draft B provisos permitting nondiscriminatory taxation of imported property and conferred protection on state property equal to the protection for property of individuals from other states.

C. *Approval of Article IV by the Continental Congress*

The Committee submitted its report on the new articles to Congress for consideration on November 13, 1777. Congress approved it after making a number of changes.⁷⁴

Congress took into consideration the articles reported by the committee as proper to be included in the confederation, and the

73. See J. KETTNER, *supra* note 7, on the refusal of British authorities to recognize naturalization by colonial legislatures. The colony that conferred naturalization might be able to treat the alien as a citizen within their boundaries, but no other colony was under a similar obligation.

74. 9 JOURNALS, *supra* note 1, at 899.

following were adopted: "And the better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the respective states; and the people of each state shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively; provided that such restriction shall not extend so far as to prevent the removal of property imported into any State to any other State of which the owner is an inhabitant; provided, also, that no imposition, duties, or restriction, shall be laid by any State on the property of the United States, or either of them."

This form of article IV of the Articles of Confederation differs substantially from the committee form. No record of the discussion for the changes exists. However, congressional behavior may be understood by comparing the new form with earlier drafts.

1. *Clause 1: The Privileges and Immunities of Free Citizens.*

[T]he free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the respective states

In Congress the committee draft restored "free" before "inhabitants" to clarify that a person bound to labor in one state would not receive the rights of a "free citizen" in another. The distinction between "inhabitants" and "free inhabitants" also suggests an awareness of the problems of slavery — slaves being excluded from the rights of free citizens.

Congress also chose the Draft B wording in preference to the committee report by specifying that the free inhabitants receive all "privileges and immunities of free citizens" rather than all "rights and privileges of natural born free citizens." Congress further provided that free inhabitants receive all privileges and immunities of free citizens "in the respective states" and not just in the state where they go to reside.

The committee draft prohibited states from interfering with persons and property crossing state lines and secured residential citizenship rights. It ignored the right to inherit property in another state, one of the oldest of all intercolonial rights, traceable to *Calvin's Case*. The extension of the protection of the first clause to free

inhabitants "in the respective states" may have been intended to fill that glaring gap.

The choice of "immunities" instead of "rights" in conjunction with "privileges" may have indicated congressional intent to narrow the conferred protection. An expansion of the protected class could reduce each member's protections. "Immunities" suggests equal regulatory exemption treatment. "Rights" may include affirmative benefits such as voting or sharing in state resources. On the other hand, the choice of "immunities" over "rights" may lack significance. The original charter documents referred to "liberties, franchises and immunities," while the colonial declarations against the Stamp Act and other English laws claimed that charter "rights" had been violated. This suggests that clear distinctions between the terms were vanishing.

The elimination of "natural born" permits distinctions between native born and naturalized state citizens to be perpetuated against citizens of other states. Thus, voting and office-holding residence requirements might be perpetuated.

2. *Free Ingress and Regress to Other States.*

. . . and the people of each state shall have free ingress and regress to and from any other State

When Congress revised the committee version, it severed the right of movement from property rights. The committee draft restricted a state's power to protect its own interests. The previous draft references to free ingress and egress of person and property "without hinderance, molestation or imposition of any kind" literally prohibited states from excluding diseased or other undesirable property from other states. The earlier drafts only permitted non-discriminatory imposts and duties. Congress saw that states needed greater power over property from other states but did not wish to give states greater power over interstate travel.

3. *The Privileges of Trade and Commerce.*

. . . and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively

The congressional revision permitted states to regulate nonresidents engaging in trade and commerce to the same extent that it regulated its own inhabitants. Trade barriers and prohibitions were allowed when based on the goods' nature or source of origin rather than on the residence of the person intending to import them.

Madison was perplexed, however, over the need to have a separate clause for the privileges of trade. "[W]hat was meant by super-adding to 'all privileges and immunities of free citizens,' 'all the privileges of trade and commerce,' cannot be readily determined."⁷⁵

Several alternatives may account for the separation of the trade and commerce privilege from the privileges of free citizens.⁷⁶ Linguistically, the best explanation is that the level of protection afforded trade and commerce was different from that afforded other privileges and immunities of citizens. The state's power to treat nonresidents in virtually any nondiscriminating way was modified by a limited guarantee for nonresidents to remove property from the state despite any state restriction on its own citizens.

4. *Proviso for the Removal of Imported Property.*

. . . provided that such restriction shall not extend so far as to prevent the removal of property imported into any State to any other State of which the owner is an inhabitant

The congressional revision acknowledged a state interest in preventing importation by permitting states to regulate trade of persons from out of state with restrictions applicable to state residents. The nondiscrimination policy dealt inadequately with the state's power to prevent exports. Import control protects against harm from such property, but export control serves to retain the benefit of the property within the state. This interest was acceptable for natural resources or even property that originated in a state, but not where the property did not originate in the state and where the owner was not a state inhabitant. If a state could forbid the removal of property brought into the state by a nonresident, the nonresident might be discouraged from entering the state with property

75. THE FEDERALIST No. 42, at 270 (J. Madison) (J. Cooke ed. 1961).

76. One alternative would find that the privileges and immunities of citizenship are confined to participation in self-government and are separate from privileges of trade and commerce. This is unlikely, because Dickinson's draft clearly considered the separate provision for trade and commerce privileges in his article VII to be an exception from the general protection for privileges in article VI. See *supra* note 66 and accompanying text.

A second alternative is to join Madison in charging the drafters with sloppiness. The separate trade privileges clause could have been a relic of the early drafts which conferred all privileges and immunities of citizens only on persons coming to another state to reside there and had to provide separately for privileges afforded nonresidents who merely wished to do business without establishing a new residence. See *supra* notes 72-73 and accompanying text.

A third possibility is that the Congressional revision was not intended to extend the privileges and immunities clause benefit beyond persons seeking new residence. This would entitle free inhabitants of a state "to the privileges and immunities of free citizens in the respective states" [by moving to other states].

to trade. A law forbidding removal of any property brought into the state would affect persons who reside in the state differently than those who reside elsewhere. This different impact may have inspired the clause in the article IV congressional revision preventing nondiscriminatory restrictions on "the removal of property, imported into any State, to any other state of which the owner is an inhabitant." The new clause may have also protected the slave-owner traveling to another state. Slavery was not yet illegal in any of the states, but abolition was beginning to be discussed.

5. *Intergovernmental Immunities.*

. . . provided, also, that no imposition, duties, or restriction, shall be laid by any State on the property of the United States, or either of them.

Each of the earlier article IV drafts protected the interstate movement of property from restrictions except for the same imposts and duties imposed on residents. This property immunity was extended to state and United States property.⁷⁷ The revision of the article to expand state power on imports led Congress to reconsider the impact of that expansion on interstate relations when applied to the property of other states or the United States. The regulation and taxation of a sovereign entity would have been a source of friction. The revised article eliminated the problem by granting a total governmental property immunity.

D. *The Adoption of Article IV*

A committee of three—Mr. Richard Henry Lee, Mr. Duane, and Mr. Lovell—was appointed "to revise and arrange the articles of confederation agreed to; and to prepare a circular letter to the respective states to accompany the said articles."⁷⁸ The Committee

77. "And provided also that the benefit of this Article Shall extend to the property of the United States, and of any particular State, in the Same manner as to the property of an Individual in any State." See 9 JOURNALS, *supra* note 1, at 888. [Draft A].

"Provided also that the Benefit of this Article shall Extend to the property of the United States and of any particular State in the same Manner as to the property of an Individual." See *id.* [Draft B].

"And provided also that the benefit of this article shall extend to the property of the United States, and of any particular State, in the same manner as to the property of an Individual." See *id.* at 889. [Committee Report].

78. See 9 JOURNALS, *supra* note 1, at 900. Their revised version was as follows:
ART.4. The better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union, the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several states; and the

changed only two words of article IV, substituting "among" for "between" in the preamble and "several" for "respective" in the text. The Committee also revised capitalization and punctuation. The article was adopted in that form by the Continental Congress on November 15, 1777 for circulation to the states.

North Carolina delegate, Thomas Burke, recorded his thoughts on the Articles of Confederation privileges and immunities clause. Burke was exceptionally wary of the provisions threatening state sovereignty. The Continental Congress adopted Articles of Confederation article II at his motion that: "Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled." However, Burke left Congress a month before the proposal of the privileges and immunities clause and had no special knowledge of its meaning when he commented on it:

The Constitution of No. Carolina permits not the Privilege of Citizens to any who have not resided therein 12 months, and paid Taxes.⁷⁹ (local protection is given to all within the Territory) the Legislature therefore cannot ratify an article which gives such privileges to persons residing in other States. Our Commons are voted for by all free Citizens, and if the Inhabitants of our Neighboring States have the privileges of Citizens in ours they might insist upon the right of voting for Members of Our Legislature which would be a political absurdity. It seems therefore proper that this article should be Amended by adding after the clause refer'd to— *not inconsistent with their respective Constitutions*.⁸⁰

Burke's suggestion would have rendered the article ineffective, because any state could subsequently discriminate against nonresidents by amending its constitution.⁸¹ His comments present a seri-

people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions, as the inhabitants thereof respectively; provided, that such restrictions shall not extend so far as to prevent the removal of property, imported into any State, to any other State of which the owner is an inhabitant; provided also, that no imposition, duties, or restriction, shall be laid by any State on the property of the United States, or either of them.

9 JOURNALS, *supra* note 1, at 908-09.

79. "That every foreigner, who comes to settle in this State, having first taken an oath of allegiance to the same, may purchase, or, by other just means, acquire, hold, and transfer land, or other real estate; and after one year's residence, shall be deemed a free citizen." N.C. CONST. of 1776, art. XL, *reprinted in* W. SWINDLER, *supra* note 10, at 407.

80. 2 LETTERS OF THE MEMBERS OF THE CONTINENTAL CONGRESS 552 (E. Burnett ed. 1921-36) [hereinafter LETTERS].

81. The state constitutions had been adopted by simple vote in the state legislatures.

ous problem if his understanding of the article's effect was correct. The possibility of nonresidents voting for state officials was unacceptable. Eliminating the voting residence requirement would have offended a number of states. Since no state suggested changing the article to respond to this problem, Burke's interpretation of the clause was probably not accepted.

The clause was most likely intended to embody the colonial right to be free from discrimination.⁸² Discrimination on the basis of residence permitted under the charters would not violate the clause. Thus, the privileges and immunities of free citizens would include rights to sue, rights to own property, and rights to be free of discriminatory regulation—but would not afford nonresidents rights to vote or hold political office.

Burke had one more objection to the proposed article IV:

The Provisionary clause of this article, in my opinion, deprives the States of every power to increase or regulate their particular Commerce, Agriculture or Manufactures. They cannot prevent by Duties or restrictions importations, or Exportations Injurious to any of them. This surely is what no staple state ought to admit, and that of all ours, who has so many Staples.⁸³

Burke's objection is that the "proviso" that restrictions on trade and commerce privileges "shall not extend so far as to prevent the removal of property, imported into any State, to any other State of which the owner is inhabitant" deprives states of the power to prevent "importations or exportations injurious to any of them." He assumes that a state cannot prevent imports by its citizens because restrictions on trade cannot prevent property removal to any other state which the owner inhabits. This construction overlooks the grammatical placement of the proviso. It is an exception only to

82. There are many other alternative readings. First, the privileges and immunities of citizens might not refer to voting, which could be viewed as an affirmative right rather than a privilege or immunity limiting government power. On the other hand, the political background which identified the phrase with the colonial claim for self-government suggests that Burke was correct in believing that the privileges and immunities of citizens include voting, at least in the negative sense that laws should not bind persons unless represented in the law-making body.

Second, the deletion of reference to "natural born" free citizens supports the view that durational residence requirements for privileges are permissible. This theory also poses difficulties. While durational residence requirements existed in the political sphere for voting and office holding, they would not seem tolerable with respect to other civil rights such as property ownership or rights to bring suit.

Third, the entitlement to the privileges of citizenship might require changing residence to obtain benefits. The omission of the express references to residence changes casts doubt on this interpretation.

83. LETTERS, *supra* note 80, at 552.

state power to enact nondiscriminatory restrictions over trade and commerce of persons of another state. It does not apply to state power over its own inhabitants. On its face, the proviso only prevents states from barring nonresidents from taking out of the state any property that was brought into the state from elsewhere. While a state could not prevent a nonresident who has brought goods into the state from elsewhere from taking those goods to a home state, a prohibition on natural resource exportation would be valid because those goods were not imported into any state. Similarly, a prohibition on the importation of any goods would be valid, because the proviso only protects nonresident exportation of goods they import lawfully.

In June 1778, when Congress asked the states to report on Articles of Confederation ratification, few states had ratified them without comment, and a number of state representatives had offered amendments. Every outside proposal was heard, considered, and rejected. The rejection of the proposed changes may have been influenced by the fear that any change would compel each state to reconsider the Articles of Confederation *de novo* causing greater delay in ratification. Nevertheless, the proposals for change show the Articles' perceived problems. On June 22, 1778, the Maryland delegates proposed that "paupers" be omitted and that "that one state shall not be burthened with the maintenance of the poor who may remove into it from any of the others in the Union" be added.⁸⁴ The issue that led to the exclusion of paupers from article IV protections was confronted directly in a separate substantive provision. The effect of the proposed new clause would make it unnecessary to separately exclude paupers and would have confirmed the worthiness of individuals who happened to be paupers without endangering the social welfare structure.

On June 25, 1778, the South Carolina delegates offered their amendments:⁸⁵

The delegates from South Carolina, being called on, moved the following amendments in behalf of their state:

1. In article fourth, between the words "free inhabitants," insert "white."

Passed in the negative. Two ayes, eight noes, one divided.

2. In the next line after the words "these states," insert "those who refuse to take up arms in defence of the confederacy."

84. 11 JOURNALS, *supra* note 1, at 631 (W. Ford ed. 1908).

85. *Id.* at 652-53.

Passed in the negative. Three ayes, eight noes.

3. After the words "several states," insert "according to the law of such states respectively for the government of their own free white inhabitants."

Passed in the negative. Two ayes, eight noes, one divided.

4. After the words "of which the owner is an inhabitant," insert "except in such cases of embargo."

Passed in the negative. Two ayes, eight noes, one divided.

South Carolina was concerned with article IV's impact on free blacks. The first and third proposals expressly excluded free blacks from the article's benefits and from being used as a basis to measure the rights to which citizens of other states would be entitled. The rejection of these two proposals may have reflected a desire to prevent discrimination against free blacks, or it could have been premised on an agreement to disagree on whether blacks came within the historic understanding of "inhabitants."⁸⁶

South Carolina's second proposal excluded Tories from citizenship privileges but also affected conscientious objectors like the Quakers.⁸⁷ The rejection of this proposal likely reflected the acknowledged state power to treat such persons as badly as it treated its own citizens who refused to bear arms. While paupers, vagabonds, and fugitives were undesirable characters, persons who had a temporary political disagreement were not so clearly dangerous to the state.

South Carolina's fourth proposal for amending article IV permitted a state to prevent the removal of property by a nonresident to a home state in cases of embargo. Here the exception could swallow the rule permitting nonresidents to remove imported property.

86. According to D. ROBINSON, *SLAVERY IN THE STRUCTURE OF AMERICAN POLITICS, 1765-1820*, at 153-54 (1971), this amendment was rejected because the delegates were in a hurry to finish the Articles, and not for any major substantive reasons. If haste was indeed the reason for not including the word *white* and thus explicitly limiting comity to "free white inhabitants," then South Carolina and other Deep South states may have felt no obligation, under the Articles or the Constitution, to grant comity to free blacks from other states. The understanding that "free inhabitants" in the Articles applied only to whites may very well have carried over into the more broadly worded provision for comity in the Constitution.

P. FINKELMAN, *supra* note 52, at 31-32 n.36.

87. Georgia made a similar proposal. Georgia had suggested in its ratification order that after "vagabond" should be added "all persons who refuse to bear arms in defense of the State to which they belong, and all persons who have been or shall be attained of high treason in any of the United States." 11 *JOURNALS, supra* note 1, at 671. The delegate from Georgia had not received instructions when asked by Congress on June 25 to report, but indicated that the state would ratify as the document stood. *Id.* at 656. Thus, the amendments recommended by the state, which also included adding the words "white inhabitants" to article IV, were not presented to the Continental Congress.

It also raised the specter of embargoes of different dimensions promulgated by each state to the confusion of foreign relations.

On June 26, 1778, the Continental Congress adopted the Articles of Confederation, effective as soon as ratified by all of the states. However, Maryland held out, and it was not until 1781 that every state ratified the Articles. A committee was then appointed to report on the effect of the Articles of Confederation. August 22, 1781, the committee responded with some diffidence:⁸⁸

The Committee appointed to prepare an Exposition of the Confederation, a plan for its complete execution and supplemental articles report.

That they ought to be discharged from the exposition of the Confederation because such a comment would be voluminous if coextensive with the subject, the omission to enumerate any Congressional powers become an argument against their existence, and it will be early enough to insist upon them, when they shall be exercised and disputed.

They further report that the Confederation requires execution in the following manner. . .

2 By describing the privileges and immunities to which the citizens of one State are entitled in another.

The Continental Congress never determined the privileges and immunities to which citizens of one state were entitled to in another. The Articles of Confederation failed to create a viable enforcement mechanism. No federal court existed to interpret the document, and the article IV ambiguities remained unresolved although article IV was, in theory, binding on the states.

Despite uncertainty, one function of article IV of the Articles of Confederation remained clear: it prohibited states from imposing any restriction not applicable to residents on nonresidents engaged in trade or commerce. Without federal enforcement, however, this command was breached with impunity during the pre-Constitution period. When the state delegates convened and proposed a new Constitution, they considered the problem of article IV violations occurring without redress. Madison noted in his *Preface* to Debates in the Convention of 1787 that:

The same want of a general power over Commerce, led to an exercise of the power separately, by the States, which not only proved abortive, but engendered rival, conflicting and angry regulations. . . . In sundry instances as of N.Y., N.J., P^a & M^d the

88. 21 JOURNALS, *supra* note 1, at 894.

navigation laws treated the Citizens⁸⁹ other States as aliens.⁹⁰

III. THE CONSTITUTION

*Sect. 2. The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.*⁹¹

Under the Articles of Confederation, each person was a citizen only of the state of permanent residence. States had obligations to citizens of other states and to the other states themselves, but the state was always a mediating body between the individual and Congress. The Constitution changed this relationship. It gave Congress direct power to legislate over individuals. The direct relationship between individual and national government transformed citizenship in the United States. For example, article I gave Congress the power to "establish an uniform Rule of Naturalization."⁹² Federal legislature qualifications included requirements that the legislator be a "Citizen of the United States."⁹³ The role once played by the King in uniting the colonies under a single citizenship was now played by the national government.

The convention did not consider the privileges and immunities clause until the national character of the new government had been established. The Virginia delegation opened the Constitutional Convention by presenting a set of resolutions stating principles for an essentially national government. Charles Pinckney of South Carolina presented a plan that slightly altered the Articles of Confederation. Pinckney's plan was referred to committee and never discussed on the convention floor. It was used later, however, by the Committee on Detail.⁹⁴ After some weeks of discussing the Virginia plan principles, William Paterson of New Jersey presented an

89. In this edition, the editor noted that the word "of" is inserted in the transcript after "Citizens."

90. NOTES OF DEBATES, *supra* note 3, at 14.

Pennsylvania established a form for registering resident-owned ships. 1778 PENNSYLVANIA LAWS Ch. LXXX § 7 (THE FIRST LAWS OF THE COMMONWEALTH OF PENNSYLVANIA, J. Cushing ed. 1984). New Jersey did so in its navigation act, 1781 NEW JERSEY LAWS Ch. CCXCIII § 6 (THE FIRST LAWS OF THE STATE OF NEW JERSEY, J. Cushing ed. 1981). Maryland provided for ship registration in 1784 MARYLAND LAWS Ch. LXXIX (THE FIRST LAWS OF THE STATE OF MARYLAND, J. Cushing ed. 1981). Maryland ships were taxed at six pence per ton while all other ships were taxed at one shilling per ton at entrance or clearance. *Id.* § 21. Taxes were also laid on specified goods with a deduction of one sixth for vessels built and navigated by Maryland residents. *Id.* at Ch. LXXIV, § 16.

91. NOTES OF DEBATES, *supra* note 3, at 625; 2 RECORDS, *supra* note 3, at 601.

92. U.S. CONST. art. I, § 8, cl. 4.

93. U.S. CONST. art. II, § 2, cl. 2, § 3, cl. 3.

94. NOTES OF DEBATES, *supra* note 3, at 33 n.36.

alternative proposal more closely conforming to the Articles of Confederation. Madison opposed the New Jersey plan on June 19, 1787, and raised the issue of the Confederation's impotency to enforce its provisions. He argued that the New Jersey plan suffered from the same infirmity.

3. Will it prevent trespasses of the States on each other? Of these enough has been already seen. He instanced Acts of Virg.⁹⁵ & Maryland which give⁹⁵ a preference to their own Citizens in cases where the Citizens of other States are entitled to equality of privileges by the Articles of Confederation.⁹⁶

Although the notes of Madison's speech do not specify the state statutes that ostensibly violated the Articles of Confederation, he probably referred to reductions for state citizens on duties owed by ships using the state ports.⁹⁷ Those preferences led Maryland and Virginia to enact a compact anticipating the wider meeting in Annapolis and finally the convention itself.⁹⁸

The conflict between large and small states, reflected in the rival plans at the Philadelphia Constitutional Convention, was resolved by a compromise that left the states with two votes each in the Senate and with House representation based on population. With some basic principles resolved, comprehensive document drafting was re-

95. The editor of NOTES OF DEBATES notes that the word "gave" is substituted in the transcript for "give."

96. NOTES OF DEBATES, *supra* note 3, at 143.

97. MARYLAND LAWS, 1784, Ch. LXXXIV, § XVI:

And, to encourage the building of merchant vessels within this state, and to navigate them by citizens of this or some of the United States, Be it enacted, That on imports in any vessel built within this state, and navigated by a master, citizen of this state, and by mariners, one half of whom are citizens of this or some one of the United States, and one half of the property of such vessel actually belongs to some one or more of the citizens of this state, there shall be a deduction from the duties imposed by this act on enumerated articles, one sixth part thereof, and from the two percent duty on non-enumerated articles, there shall be a deduction of one eighth part thereof, and if reduced to one per cent there shall be a deduction of one fourth part thereof; and on exports in any such vessel, navigated and owned as aforesaid, there shall be a deduction of one third part of the duty imposed by this act; and on imports in any vessel built within this state, and entirely owned by citizens thereof, and wholly navigated by a master and mariners, all of whom are citizens of this state, there shall be a deduction from the duties imposed by this act on enumerated articles, of one third part thereof, and from the two per cent duty, a deduction of one fourth part thereof, and if reduced to one cent a deduction of one half part thereof; and on exports in any such vessel, there shall be a deduction of one half part of the duty imposed by this act.

LAWS OF VIRGINIA, 1783, ch. XXXVIII [11 Henings Statutes at Large 289], § III: Provided always, That no ship or other vessel, belonging to any citizen or citizens of this commonwealth, and no ship or other vessel, under the burthen of sixty tons, belonging to any citizen or citizens of the state of Maryland, shall be subject to the duty on tonnage.

98. See 12 HENING'S STATUTES AT LARGE 50, LAWS OF VIRGINIA, 1785 ch. XVII.

ferred to a Committee of Detail. The committee was to bring together the principles adopted by the convention with articles not in dispute. The committee draft of August 1787 introduced the privileges and immunities clause to the Convention.

The free (inhabs) Citizens of each State shall be intitled to all Privileges & Immunities of free Citizens in the sevl States.⁹⁹

In the August 6, Committee of Detail report, "(inhabs)" was dropped and "free" omitted. Madison subsequently argued in *The Federalist* that "inhabitants" in the privileges and immunities clause suggested that an alien resident of one state could achieve the rights of a citizen in other states. "Citizen" avoided this possibility. Under the Articles, the biggest problem in conferring privileges and immunities on citizens of other states had been any one state's ability to naturalize foreigners on conditions unacceptable in other states. The new Constitution conferred on Congress the uniform power of naturalization.¹⁰⁰ Thus, the Committee of Detail report specified that "the citizens" of each state be entitled to the privileges and immunities of citizens.

"Free" modified "inhabitants" to prevent slaves from being given rights. However, this term was unnecessary when "citizen" was used, because slaves were not citizens. There was no reason to deny indentured servants (if any remained after the Revolution had disrupted any lingering indenture pattern) the rights granted to citizens (including bound citizens).

The Committee of Detail report also eliminated "free" in the measure of rights afforded citizens of a state. They were only entitled to the privileges and immunities afforded "citizens" in contrast to "free citizens." This change may have encouraged omission of the exception clause for "paupers, vagabonds and fugitives from justice," who could be bound or imprisoned according to the law applicable to residents. That law may have sufficiently protected state interests.

99. 2 RECORDS, *supra* note 3, at 173-74. Pinckney claimed to have introduced this clause into the Constitution. See Appendix A, CCCXXXVIII; 3 RECORDS, *supra* note 3, at 445-46.

This clause was in the last of the series of documents found among the Wilson Papers in the Library of the Historical Society of Pennsylvania. Farrand numbered the document IX and noted: "Found among the Wilson Papers, and in Wilson's handwriting, but with emendations in Rutledge's hand. Parts in parentheses were crossed out in the original; italics represent additions by Wilson; emendations by Rutledge are in angle brackets < >." 2 RECORDS, *supra* note 3, at 163 n.17. The section on privileges and immunities was part of a longer section enclosed in angle brackets, written by Rutledge.

100. THE FEDERALIST No. 42, at 271 (J. Madison) (J. Cooke ed. 1961).

Sixty-five years later, the Supreme Court discussed whether the word "citizen" included free blacks. Chief Justice Taney argued that "citizen" excludes "every description of persons . . . not fully recognized as citizens in the several states." Consequently, he contended that free blacks were not citizens.¹⁰¹ Justice Curtis pointed to the defeat of the South Carolina amendments to the Articles to demonstrate that free blacks were entitled to the privileges and immunities of citizens under the Articles. He argued that nothing in the Constitution suggests that it deprived anyone of citizenship; thus, free blacks who were citizens under the Articles are citizens under the Constitution. Nothing in the Constitutional Convention debates indicates that thought was given to the status of free blacks.¹⁰²

One mystery in the new article is why the Committee of Detail used only the privileges and immunities clause and did not include the separate Articles of Confederation provisions dealing with interstate travel and the privileges of trade and commerce.

The Constitution conferred powers on Congress that did not exist under the Articles. Congress had the power to regulate commerce among the several states.¹⁰³ It could decide whether individuals' rights to remove property imported into one state to

101. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 419 (1857).

102. In 1821, Charles Pinckney spoke in Congress on the admission of Missouri. He claimed that he proposed article IV, § 2. He stated that:

at the time I drew that constitution, I perfectly knew that there did not then exist such a thing in the Union as a black or colored citizen, nor could I then have conceived it possible such a thing could have ever existed in it; nor, notwithstanding all that has been said on the subject, do I now believe one does exist in it.

3 RECORDS, *supra* note 3, at 446.

No accurate copy of Pinckney's proposal exists. Farrand constructed a sketch based on several sources. The exact language of article IV which Pinckney proposed is also lost. Farrand includes the relevant portion from observations Pinckney prepared as a speech to accompany his draft:

The 4th article . . . is formed exactly upon the principles of the 4th article of the present confederation, except with this difference, that the demand of the Executive of a State for any fugitive criminal offender shall be complied with. It is now confined to treason, felony, or other high misdemeanor.

Id. at 606-07.

Pinckney's proposals were referred to the Committee of Detail with all other proposals, but he was not on the Committee which reported out the final form. 2 RECORDS, *supra* note 3, at 97-98. Pinckney may not have influenced the final form of the article nor engaged in any discussion at the Convention over its meaning. His views on black citizenship three decades later had little if any relevance to the understanding of the convention or the ratifying conventions.

103. Being in the same terms with the power over foreign commerce, the same extent, if taken literally, would belong to it. Yet it is very certain that it grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States

their state of residence should be protected. Congressional power was a more flexible tool than the Articles' ban on such state laws. With the removal of that proviso from the Articles, however, there was no longer any reason to distinguish between the privileges and immunities of citizens generally and the privileges of trade and commerce. Thus Madison, writing in *The Federalist*, saw no need for a separate trade privileges clause.

The elimination of the clause providing for "free ingress and egress to and from any other state" is more difficult to explain. Professor Chafee wrote that, "[t]he reason for not expressly giving 'free ingress and regress' across state lines must be that it is in the Constitution, somewhere else. But where?"¹⁰⁴ He apparently finds it later in the commerce clause reinforced by the due process clause.¹⁰⁵ The Framers may have considered it implicit in article IV. Since the privileges and immunities clause grants a citizen rights in another state, any attempt by the origin or destination state to prevent interstate travel would deny the individual those rights.

Finally, the Committee of Detail report omitted the exception for paupers, vagabonds and fugitives from justice contained in article IV of the Articles of Confederation. The exception for fugitives had probably been redundant, because both the Constitution and the Articles provided for the extradition of fugitives to the state charging them with a crime. The Constitution extended the extradition clause to persons charged with any crime, not just treason, felony or high misdemeanors. Thus, fugitives could never claim all privileges and immunities of citizens under the Constitution, because they were always subject to extradition.

The pauper, on the other hand, raised unique questions. Constitutional national citizenship would break down part of the reluctance to acknowledge as citizens paupers moving into the state.

themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged.

Letter from James Madison to J.C. Cabell (Feb. 13, 1829). 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 14-15, reprinted in 3 RECORDS, *supra* note 3, at 478.

104. Z. CHAFEE, JR., THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, at 185 (1956).

105. *Id.* at 192-93. Chafee dismisses article IV as a source for the right of interstate travel because the Court had not used that clause. He also indicated that the use of article IV as the basis of the right would be too restricting. He reasoned that article IV forbids only nondiscrimination and concluded that a state could exclude nonresidents by prohibiting its own residents from returning if they left the state for a period of time. His hypothetical need not lead to that result. Article IV specifies that a citizen is entitled to all privileges and immunities of citizens in the several states. If the nonresident is entitled to the privilege of a citizen in another state, any barrier to return is irrelevant.

Further, the obligation of support for the poor was local; therefore, the refusal to permit an individual to settle in a particular local area to prevent the imposition of a community burden would be common to persons within and without the state. The right to cross state borders might thus be protected by article IV, but the right to reside in a particular community within a state was unprotected. The paupers and vagabonds exception—as well as that for fugitives—may have been unnecessary to preserve the state's right to deal with the problems they posed.

On August 6, the Committee of Detail report was submitted to the Convention. The privileges and immunities clause was proposed as a separate article, numbered XIV.

The Citizens of each State shall be entitled to all privileges and immunities of citizens in the several states.¹⁰⁶

The clause received little debate at the Convention. One proposal required a period of citizenship before individuals would be eligible to serve in the national legislature. On August 13, Pennsylvania delegates objected that the requirement conflicted with their constitutional provision granting foreigners all the rights of citizens after two years' residence. Wilson argued that foreigners who came to Pennsylvania had been promised full participation and that the adoption of such a restriction would be a breach of faith.

M^r GOV^r MORRIS moved to add to the end of the section [art IV. S. 2] a proviso that the limitation of seven years should not affect the rights of any person now a Citizen

M^r WILSON read the clause in the Constitution of Pen^a giving to foreigners after two years residence all the rights whatsoever of citizens, combined it with the article of Confederation making the Citizens of one State Citizens of all, inferred the obligation Pen^a was under to maintain the faith thus pledged to her citizens of foreign birth, and the just complaints which her failure would authorize.¹⁰⁷

The discussion suggests that citizenship rights included candidacy and perhaps voting. The convention was concerned with the

106. NOTES OF DEBATES, *supra* note 3, at 394; 2 RECORDS, *supra* note 3, at 187.

107. NOTES OF DEBATES, *supra* note 3, at 439, 441; 2 RECORDS, *supra* note 3, at 270,

272. The Pennsylvania Constitution provided in § 42 that

Every foreigner of good character who comes to settle in this state, having first taken an oath or affirmation of allegiance to the same, may purchase, or by other just means acquire, hold, and transfer land or other real estate; and after one year's residence, shall be deemed a free denizen thereof, and entitled to all the rights of a natural born subject of this state, except that he shall not be capable of being elected a representative until after two years residence.

8 PA. CONST. of 1776, § 42, reprinted in W. SWINDLER, *supra* note 10, at 284.

merits of the citizenship requirement, but no one responded to the Pennsylvania delegate's concern over vested rights. Perhaps the argument was too obvious to voice. Pennsylvania citizens were not deprived by the proposed Constitution of any rights which they presently had. Prior to the Constitution, there was no real national government. The potential for new Pennsylvania citizens to be selected as a delegate to the Continental Congress was not comparable to the position of representative in Congress after adoption of the Constitution. They would continue to be afforded the privileges and immunities of citizenship in other states secured by the Articles.

On August 28, 1787, the Convention considered the privileges and immunities clause, numbered article XIV.

Aⁿ XIV was taken up.

G^{enl} PINKNEY was not satisfied with it. He seemed to wish some provision should be included in favor of property in slaves.

On the question on Art: XIV.

N.H. ay. Mas ay. C^t ay. N.J. ay. P^a ay. Del ay. M^d ay. V^a ay. N.C. ay. S.C. no. Geo divided.¹⁰⁸

Madison's notes are unclear about General Charles Cotesworth Pinckney's thoughts on amending the clause. He may have sought assurances that slaveowners could bring their slaves into other states without risking loss.¹⁰⁹ The privileges and immunities clause of the Articles had specifically provided that the owners of property imported into a state could remove it to the state where they reside. That Article was drafted before abolitionism seriously threatened slave property, but by 1787 Pinckney may have seen that the proviso protected rights in slaves while in transit. Madison's failure to appreciate Pinckney's views may relate to his inability to under-

108. NOTES OF DEBATES, *supra* note 3, at 545; 2 RECORDS, *supra* note 3, at 443. Far-
rand appears to have erred later, for at 577 he cites the privileges and immunities clause as
voted on prior to the work of the Committee on Style as "[t]he citizens of each State shall be
entitled to all privileges and immunities of citizens of the several States." This is inconsistent
with his description of the clause coming from the Committee on Detail and with his footnote
to the text at 443. If, however, his listing at 577 is accurate, the substitution of "in" would
have taken place in the Committee on Style. See *id.* at 443 n.28, 577 (emphasis supplied).

109. It is likely that Pinckney was concerned with slave movement and masters in
transit when he raised the objection. Throughout the convention the proslavery
representatives had been adamant about protecting their property. It seems odd,
therefore, not that Pinckney made the suggestion, but that it was not pursued.
Three likely explanations may be offered. Pinckney may have felt the problem too
remote or insignificant to worry about; he may have felt it would be impossible to
win concessions on this point and chose discretion over valor; finally, he may have
been convinced by his colleagues or upon reconsideration that precedent and the
existing clause offered enough protection to slave property.

P. FINKELMAN, *supra* note 7, at 35 (footnotes omitted).

stand why the Articles separated trade and commerce privileges from the other privileges and immunities of citizenship.

Pinckney's concern may have been to assure that other states would recognize the slaveowners' property rights to slaves in their home state.¹¹⁰ Thus, the very next article discussed at the Convention referred to any person charged with treason, felony, or high misdemeanor in any state who flees from justice. Pierce Butler and Charles Pinckney moved "to require fugitive slaves to be delivered up like criminals."¹¹¹ Although he withdrew the August 28 motion to permit voting on the article, Butler renewed it on August 29 with more carefully considered language. It was unanimously accepted.¹¹²

George Mason of Virginia made the following notes on his draft copy of September 12:¹¹³

Section 2nd, Article 4th—The citizens of one State having an estate in another, have not secured to them the right of removing their property as in the 4th Article of the Confederation—amend by adding the following clause: and every citizen having an estate in two or more States shall have a right to remove his property from one State to another. (not proposed)

Mason did not make this omission a ground for his opposition to the Constitution. Either he considered the absence of restrictions on the states an insignificant flaw or the grant of power over interstate commerce to be adequate to secure removal of property where appropriate.

On September 12, 1787, the Committee on Style reported out the Constitution. They renumbered the privileges and immunities clause but made no other changes.

IV. . . Sect. 2. The citizens of each state shall be entitled to all

110. Because Pinckney raised his objection when article XIV was debated (rather than at the time of the debate on the Fugitives from Justice article), it seems that he was not referring to fugitive slaves. This assumption is strengthened by the fact that the Privileges and Immunities Clause of the Articles of Confederation specifically protected property "imported into any State, to be removed to any other States of which the owner is an inhabitant." Slaves in transit would of course have been an important type of property protected by this clause. It seems fair to assume that Pinckney wanted that property protected in the Constitution.

Id. at 35 n.44.

111. NOTES OF DEBATES, *supra* note 3, at 545.

112. Mr. Butler moved to insert after art: XV. "If any person bound to service or labor in any of the U. States shall escape into another State, he or she shall not be discharged from such service or labor, in consequence of any regulations subsisting in the State to which they escape, but shall be delivered up to the person justly claiming their service or labor," which was agreed to nem: con:

NOTES OF DEBATES, *supra* note 3, at 552.

113. 2 RECORDS, *supra* note 3, at 636-37.

privileges and immunities of citizens in the several states.¹¹⁴

On September 15, 1787, the Convention voted to adopt the Constitution as amended and on September 17 voted to adopt it as enrolled.¹¹⁵

The absence of serious debate over the privileges and immunities clause indicates that it was not innovative. Taken from the Articles of Confederation, it had supplied the interstate links missing when independence was declared. It gave content to United States citizenship. As the Supreme Court has noted, "[T]he provision was carried over into the comity article of the Constitution in briefer form but with no change of substance or intent, unless it was to strengthen the force of the Clause in fashioning a single nation."¹¹⁶

IV. RATIFICATION

[I]n order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens.¹¹⁷

The article IV privileges and immunities clause drew virtually no attention in the debates on Constitutional ratification. Because it was so clearly drawn from the Articles of Confederation, those who favored rejection of the Constitution in favor of the Articles could raise no principled objection. Madison and Hamilton mention the clause in *The Federalist* as support for other propositions. The provision for a uniform system of naturalization eliminated the cautionary need to identify citizens of a state entitled to privileges and immunities. The Constitution omitted state power to exclude specific classes of undesirables. The other portions of the Articles of Confederation clause which balanced state powers over nonresidents were moot when citizenship came from the federal government. Indeed Madison's only reference to the privileges and immunities clause in *The Federalist* argued that the provision for a uniform system of naturalization cured the major defect of the Articles and that the language of article IV was better than that of the Articles.¹¹⁸

114. NOTES OF DEBATES, *supra* note 3, at 625; 2 RECORDS, *supra* note 3, at 601.

115. NOTES OF DEBATES, *supra* note 3, at 652, 655; 2 RECORDS, *supra* note 3, at 633, 644.

116. *Austin v. New Hampshire*, 420 U.S. 656, 661 (1975) (footnotes omitted).

117. THE FEDERALIST No. 80, at 478 (A. Hamilton) (C. Rossiter ed. 1961).

118. In the fourth article of the Confederation, it is declared "that the *free inhabitants* of each of these States, paupers, vagabonds, and fugitives from justice excepted,

Hamilton focused more directly on the privileges and immunities clause in *The Federalist*. His purpose was to justify the grant of federal jurisdiction in diversity of citizenship cases; but rather than discuss the substance of the clause, he focused on the procedure for enforcing it.¹¹⁹ In short, the clause engendered no controversy leading to a discussion illuminating its scope until long after it had been adopted.

V. THE RELEVANCE OF HISTORY TO INTERPRETIVE ISSUES

Disputes in interpretation of the privileges and immunities clause have proliferated in the two centuries since its adoption. Partisans of a variety of conflicting interpretations could often draw on historical data for support. Ultimately, the issues must be resolved in a context broader than that of framers' intent, but, for many, questions of meaning cannot be satisfactorily resolved without a connection to intent at some level of generality.

A. *Natural Law*

One of the earliest judicial opinions considering the privileges

shall be entitled to all privileges and immunities of *free citizens* in the several States; and *the people* of each State shall, in every other, enjoy all the privileges of trade and commerce," etc. There is a confusion of language here which is remarkable. Why the terms *free inhabitants* are used in one part of the article, *free citizens* in another, and *people* in another; or what was meant by superadding to "all privileges and immunities of free citizens," "all the privileges of trade and commerce," cannot easily be determined What would have been the consequence if such persons, by residence or otherwise, had acquired the character of citizens under the laws of another State, and then asserted their rights as such, both to residence and citizenship, within the State proscribing them. Whatever the legal consequences might have been, other consequences would probably have resulted of too serious a nature not to be provided against. The new Constitution has accordingly, with great propriety, made provision against them, and all others proceeding from the defect of the Confederation on this head, by authorizing the general government to establish a uniform rule of naturalization throughout the United States.

THE FEDERALIST No. 42, at 269-71 (J. Madison) (J. Cooke ed. 1961).

119. It may be esteemed the basis of the Union that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." And if it be a just principle that every government *ought to possess the means of executing its own provisions by its own authority* it will follow that in order to the inviolable maintenance of that equality of privileges and immunities to which the citizens of the Union will be entitled, the national judiciary ought to preside in all cases in which one State or its citizens are opposed to another State or its citizens. To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principle on which it is founded.

THE FEDERALIST No. 80, at 478 (A. Hamilton) (C. Rossiter ed. 1961).

and immunities clause of article IV identified them with fundamental natural law rights.

The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent and sovereign.¹²⁰

This view of article IV as a constitutional source for the protection of fundamental rights was stated in political arguments, and was applied by Chief Justice Taney as a basis for denying citizenship to blacks in *Dred Scott v. Sanford*.¹²¹

The language of the article can be read to grant specific rights to the individual, rather than simply protecting against discrimination. "The privileges and immunities" to which citizens of each state are entitled are those of "citizens in the several states." Although this may be interpreted as a reference to the privileges granted a citizen in each state separately, it literally can bear the meaning of privileges so fundamental that they exist in all of the states.¹²²

Professor Antieau argued that the fundamental rights interpretation of the privileges and immunities clause explains the separation of the clauses on privileges and immunities of citizens and privileges and immunities of trade in the Articles of Confederation. The former, he maintained, applies to fundamental natural rights while the clause on trade applied only to prevent discrimination based on residence. It was the former, he noted, that was used in the Constitution.¹²³

Finally, the charter clauses which foreshadowed the constitutional provision were identified by 1774 with the natural rights of man. The pamphleteers of independence had abstracted from English law its "fundamental principles" as the privileges and immunities to which the colonists were entitled. The next logical step in this process of abstraction would be to identify the fundamental principles of English law as the fundamental rights of all citizens. The Declaration of Independence shifted colonial claims from the

120. *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C. E.D. Pa. 1823).

121. 60 U.S. (19 How.) 393 (1857). See Bogen, *The Transformation of the Fourteenth Amendment: Reflections from the Admission of Maryland's First Black Lawyers*, 44 MD. L. REV. 939 (1985).

122. See Antieau, *Paul's Perverted Privileges or the True Meaning of the Privileges and Immunities Clause of Article Four*, 9 WM. & MARY L. REV. 1, 5 (1967).

123. *Id.* at 3.

rights of Englishmen to the natural rights of man, and logically could have influenced the drafters of the Articles and the Constitution to include a clause protecting such fundamental rights.¹²⁴

This array of arguments proved persuasive to a generation confronted with the moral breakdown of society represented by slavery. Slavery was constitutional, but contrary to fundamental principles of natural law. The symbolic honor and integrity of the Constitution could be saved by identifying it with fundamental rights. This the framers of the fourteenth amendment attempted to do in the privileges and immunities clause of that amendment. The arguments for a fundamental right interpretation are far less compelling to a modern generation more skeptical of the ability of anyone, much less a court, to define fundamental rights in a generally satisfactory manner.

The linguistic arguments for natural rights interpretation of article IV ignore the drafting history of the clause. That history shows the privileges and immunities were to be based on those found in each state separately, rather than an abstraction common to all states. The committee that proposed the privileges and immunities clause of article IV of the Articles of Confederation specified that the privileges to which inhabitants of every state were entitled were "the rights and privileges of the natural born free Citizens of the State to which they go to reside." Only the right to travel was stated as an independent substantive right not based on the principle of nondiscrimination. Congressional revision removed the limitation of the privileges and immunities clause to persons going to reside in another state, but retained the sense that the privileges and immunities to which the citizens of each state are entitled are those that citizens receive in the states to which they travel. The congressional revision referred to the "privileges and immunities of free citizens in the respective states" which clearly envisions serial privileges and immunities that differ from state to state. The ultimate change of the Committee on Style for the Articles, replacing "respective" with the word "several" bears no hint of a change in meaning.

Antieau's contention that the distinction between privileges of citizens and privileges of trade in the drafting of the Articles re-

124. But see J. REID, *The Irrelevance of the Declaration*, LAW IN THE AMERICAN REVOLUTION AND THE REVOLUTION IN AMERICAN LAW 46 (Hartog, ed. 1981). Reid argues that natural law was not a significant element in the Declaration. To the extent this is true, it becomes even more unlikely that the privileges and immunities clause had reference to natural law.

flected the distinction between fundamental rights and protection against discrimination also fails on analysis. Dickinson's draft used the standard of existing rights rather than fundamental rights. The later committee on amendments severed the clauses to restrict the general privileges and immunities clause application to persons changing residence. The separation of the clauses in the congressional revision does not appear to work a sudden change in the principle of all the earlier drafts which measured privileges and immunities by what existed for residents of the state in question.

Finally, the historic identification of colonial charter provisions of the liberties of Englishmen with fundamental principles of natural law was based on the proposition that the rights that existed as positive law in England could be independently determined to be principles of natural law. Thus, natural law was not the source of the rights, it merely happened to coincide with the principles of government of Great Britain. When the colonists rested their claims to independence on natural rights in the Declaration of Independence, they chose language of "inalienable rights" and not the historically bound charter phrases of privilege, liberties, franchises or immunities. Thus, there is no basis for believing that the term "privileges and immunities" had altered its meaning from a reference to rights based on existing law to a natural law framework.

The "fundamental right" vision of the "privileges and immunities" clause of article IV is, more importantly, inconsistent with the structure and history of the document. The purpose of the clause, stated in the Articles of Confederation, was "the better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this Union." This suggests that preventing parochialism was more important than individual rights. Article IV in the Articles of Confederation is the only provision in the document using language of individual rights. The limited guarantee to individuals that states would not discriminate on the basis of state residence is a reasonable provision for federalism, but a national right to have a state afford each individual fundamental rights is inconsistent with the jealousy for state sovereignty manifested in the Articles.

In the Constitution, the privileges and immunities clause is a part of an article that deals almost exclusively with problems of federalism rather than individual rights.¹²⁵ It does provide a right for

125. Note, *The Interstate Privileges and Immunities: Fundamental Rights or Federalism*, 15 CAP. U. L. REV. 493, 499-50 (1986).

the individual, but the context demonstrates the rights are granted to promote interstate harmony rather than from concern for the individual. The link Hamilton made in *The Federalist* between the protection of the privileges and immunities clause and diversity of citizenship jurisdiction in article III supports this view. In the context of justifying the grant of diversity jurisdiction to federal courts, Hamilton wrote:

To secure the full effect of so fundamental a provision against all evasion and subterfuge, it is necessary that its construction should be committed to that tribunal which, having no local attachments, will be likely to be impartial between the different States and their citizens and which, owing its official existence to the Union, will never be likely to feel any bias inauspicious to the principles on which it is founded.¹²⁶

In Hamilton's view, then, the clause confers rights only on the citizen of one state with respect to privileges and immunities afforded him in another state. Thus, Hamilton may also be cited in support of the proposition that the clause secures only equality with residents.

The Court agrees that article IV protects against discrimination and does not establish natural law rights.

It has come to be the settled view that Article IV, § 2, does not import that a citizen of one State carries with him into another fundamental privileges and immunities which come to him necessarily by the mere fact of his citizenship in the State first mentioned, but, on the contrary, that in any State every citizen of any other State is to have the same privileges and immunities which the citizens of that State enjoy. The section, in effect, prevents a State from discriminating against citizens of other States in favor of its own.¹²⁷

The history of the clause suggests that article IV is more than a mere prohibition against discrimination affecting nonresidents. It also is the source of a right to travel and a right to establish residence and become a citizen in a new state without being subjected to unwarranted residence requirements. In the years to come it will play an increasingly vital role in constitutional litigation.

B. *The Right to Travel*

In a concurring opinion in *Zobel v. Williams*,¹²⁸ Justice

126. THE FEDERALIST NO. 80, at 478 (A. Hamilton) (C. Rossiter ed. 1961).

127. *Hague v. CIO*, 307 U.S. 496, 511 (1939), cited in *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 382 (1978).

128. 457 U.S. 55, 71 (1982).

O'Connor argued that the right to travel is based on the article IV privileges and immunities clause. "[A]pplication of the Privileges and Immunities Clause to controversies involving the 'right to travel' would at least begin the task of reuniting this elusive right with the constitutional principles it embodies."¹²⁹

Justice O'Connor noted the right of free ingress and egress in article IV of the Articles of Confederation. Based on Pinckney's comment that article IV of the Constitution was based on the principles of the Articles, she argued that it included the right to travel and that the omission of the express provision was to prevent redundancy. O'Connor then recited early case law supporting article IV as the source for the right to interstate travel.

In *Corfield v. Coryell*, 6 F. Cas. 546, 552 (C.C. E.D. Pa. 1823), (No. 3,230) for example, Justice Washington explained that the Clause protects the "right of a citizen of one state to pass through, or to reside in any other state." Similarly, in *Paul v. Virginia*, 8 Wall., at 180, the Court found that one of the "undoubt[ed]" effects of the Clause was to give "the citizens of each State. . . the right of free ingress into other States, and egress from them." See also *Ward v. Maryland*, 12 Wall. 418, 430 (1871). Finally, in *United States v. Wheeler*, 254 U.S. 281, 297-298 (1920), the Court found that the Clause fused two distinct concepts: (1) "the right of citizens of the States to reside peacefully in, and to have free ingress into and egress from" their own States, and (2) the right to exercise the same privileges in other States.¹³⁰

Justice Brennan's concurrence in *Zobel*, in which Justices Blackmun, Marshall, and Powell joined, rejected O'Connor's views. "I note that the frequent attempts to assign the right to travel to some textual source in the Constitution seem to me to have proved both inconclusive and unnecessary."¹³¹ He stated that the right may equally plausibly be found in the commerce clause or privileges and immunities clause of the fourteenth amendment. "In any event, in light of the unquestioned historic recognition of the principle of free interstate migration, and of its role in the development of the Nation, we need not feel impelled 'to ascribe the source of this right to travel interstate to a particular constitutional provision.'"¹³²

Justice Brennan's nonchalance over the source of the right to travel may reflect his view that there are implicit constitutional

129. *Id.* at 81.

130. *Id.* at 80.

131. *Id.* at 66.

132. *Id.* at 67 (citation omitted).

rights derived from basic values of human dignity and responsibility which do not require specific textual justification. The "right to privacy," including the choice of whether to abort a fetus as set forth in *Roe v. Wade*¹³³ and subsequent cases, appears to be such a right. The strongest supporters of *Roe* on the Court have been the strongest opponents of O'Connor's attempt to root the right to travel in the text of the Constitution. If *Roe* is to survive, however, it should be justified on its own unique merits, for the right to travel has strong historical and textual support within the language of the document.

Justice O'Connor apparently reasoned that the right to enter and to leave a state was a privilege or immunity of citizenship. The subject in colonial times was privileged to go anywhere within the dominions of the king, a right specifically protected by the Articles of Confederation and, therefore, a privilege of citizenship when the Constitution was adopted.

The right is also implicit in the text. Article IV states that the citizen in one state is entitled to the privileges and immunities of citizens in another state. If the state of origin prohibits leaving, it will prevent a citizen from obtaining article IV privileges. Similarly, if the state of destination excludes the citizen, it also obstructs obtaining the privileges. In *Crandall v. Nevada*,¹³⁴ Justice Miller deduced the right to travel from the citizen's right to obtain access to federal offices in states other than one's own. The same mode of reasoning applied to article IV demonstrates that citizens have a right to travel across state lines to obtain the treatment to which they are entitled.¹³⁵

With history and text supporting an article IV right to travel, the court nonetheless rejected that clause. In *Crandall v. Nevada*, Nevada imposed a dollar tax on anyone leaving the state by commercial carrier. The tax did not discriminate between citizens of Nevada and citizens of other states. It was collected by the carrier

133. 410 U.S. 113 (1973).

134. 73 U.S. (6 Wall.) 35 (1867).

135. The argument is not foolproof. A counter argument is that citizens are entitled to the privileges in another state only if they can get there. This position assumes that the clause is directed at state behavior with regard to persons who have traveled to it, preventing discrimination within a state, and is not concerned with whether an individual may enter or leave the state. The right to enter or leave a state would then depend upon the rules applicable to the state residents. This counterargument fits the language of the clause as well as the argument of the text, but it is historically and politically weak. The argument that an individual right to obtain privileges in another state includes as a necessary corollary the right to travel there is a logical and supportable textual inference.

and paid to the state. Crandall refused to report the number of passengers carried out of state by his stage and refused to pay the tax. Nevada argued to the court that the state tax did not violate the commerce clause or the import clause. No right to travel was mentioned. Justice Miller agreed that the tax did not violate either clause but reversed the conviction on the grounds that the tax interfered with the right to travel. Miller argued that interference with travel violated the supremacy clause because it impeded federal government operations by burdening persons who travel in order to deal with federal agencies.¹³⁶ The failure to cite article IV may have resulted from failure to argue it. Article IV is a better basis for the right to travel, because Miller's abstract argument only supports the right to travel to deal with the federal government. His method of argument applied to article IV, however, supports the right to travel interstate for any purpose.

In *Edwards v. California*,¹³⁷ the Court struck down a California statute prohibiting the transportation of indigents into the state as invalidly interfering with interstate commerce. Justices Douglas and Jackson concurred on the grounds that the right was a privilege or immunity of federal citizenship under the fourteenth amendment.

The majority preference for commerce clause analysis may have been affected by the state's "historical exception" argument. California noted that the Articles of Confederation expressly excepted paupers from those entitled to the privileges and immunities of citizens and argued that article IV was intended to perpetuate the Articles' limitations. The court may have feared that an article IV right to travel would perpetuate the restrictions on travel permissible in 1787. An historical intent argument would similarly affect commerce clause use to prohibit the exclusion of paupers. If the commerce clause was "framed upon the theory that the peoples of the several States must sink or swim together,"¹³⁸ the omission of the pauper exception in article IV constitutional privileges and immuni-

136. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); see also *The Passenger Cases*, 48 U.S. (7 How.) 283, 492 (1849) (Taney, C.J., dissenting) ("For all the great purposes for which the Federal government was formed, we are one people with one common country. We are all citizens of the United States; and as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States."). In *Dred Scott v. Sandford*, Taney indicated that the right to enter and stay in other states was one of the protected privileges. 60 U.S. (19 How.) 393, 416-17 (1856).

137. 314 U.S. 160 (1941).

138. *Baldwin v. Selig*, 294 U.S. 511, 523 (1935), quoted in *Edwards v. California*, 314 U.S. 160, 174 (1941).

ties could result from a similar theory. More likely, the Framers understood that the right to travel was not unlimited. States retained the right to exclude persons posing a danger to the state from crime (fugitives from justice) or contagion.¹³⁹ The Framers may have thought indigence posed a similar problem, but they did not embody any such assumption into the Constitution. The state need not support the poor, and poverty alone is not a threat to health or safety. As Justice Jackson said in the *Edwards* concurrence, "[t]he mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed or color."¹⁴⁰

Justices Douglas and Jackson disapproved of the majority's reliance on the commerce clause as the source of individual rights.¹⁴¹ The commerce clause, although plausible support for *Edwards*, is weak support for the right to travel because it is a grant of power to Congress which could pass laws restricting travel. The *Edwards* concurrence relied instead on the fourteenth amendment privileges and immunities clause to recognize the right to travel as a privilege of national citizenship.

Douglas's opinion rejected article IV as the basis of decision because it deals primarily "with the incidents of residence . . . and the exercise of rights within a State, so a citizen of one State is not in a condition of alienage when 'he is within or when he removes to another State.'" ¹⁴² He said that article IV cannot justify *Crandall* because the statute in that case applied both to Nevada citizens and to citizens of other states. But if the right to travel is found in article IV as a corollary of the right to receive privileges in the several states, it applies to the natives of a state desiring to leave as well as to persons from other states desiring to enter. As a right secured by article IV to all citizens, under the fourteenth amendment it is also a privilege and immunity of United States citizenship.¹⁴³ The privi-

139. See *Edwards*, 314 U.S. at 184 (Jackson, J., concurring).

140. *Id.* at 184-85.

141. "To hold that the measure of his rights is the commerce clause is likely to result eventually either in distorting the commercial law or in denaturing human rights." *Id.* at 182 (Jackson, J., concurring).

142. *Id.* at 180 (citation omitted).

143. Douglas, referring to Miller's opinion in the *Slaughterhouse Cases*, said that "his failure to classify that right as one of state citizenship protected solely by Article IV, § 2, underscores his view that the free movement of persons throughout this nation was a right of national citizenship." *Id.* at 180. But Miller cited article IV of the Articles of Confederation, including the provision on free ingress and regress, stated the privileges and immunities of article IV of the Articles and of the Constitution are the same. and then said, "In the Articles of Confederation we have some of these specifically mentioned, and enough perhaps to give some general idea of the class of civil rights meant by the phrase." The *Slaughterhouse*

leges and immunities clause of the fourteenth amendment is not a separate source of rights under Justice Miller's interpretation in the *Slaughterhouse Cases* but protects only national privileges and immunities existing prior to the amendment's adoption.¹⁴⁴

Justice Jackson's concurrence in *Edwards* pointed to the interpretation of privileges and immunities as susceptible to a natural law interpretation that could free the Court to strike down any disfavored law without reference to specific values articulated in the document. Jackson wrote:

For nearly three-quarters of a century this Court rejected every plea to the privileges and immunities clause [of the fourteenth amendment]. . . . This Court . . . has always hesitated to give any real meaning to the privileges and immunities clause lest it impossibly give too much. This Court should, however, hold squarely that it is a privilege of citizenship of the United States, protected from state abridgment, to enter any state of the Union, either for temporary sojourn or for the establishment of permanent residence therein and for gaining resultant citizenship thereof. If national citizenship means less than this, it means nothing.¹⁴⁵

This fear has distorted perceptions of article IV privileges and immunities. On its face, article IV should apply to citizens in the state of which they are citizens. That state is also one of "the several states" in which they are entitled to the privileges and immunities of citizens. If citizens of a state were to be protected only in states where they were not citizens, the article should have used the phrase "in any other of the states." But protecting a citizen in one's home state is meaningless unless one is entitled to some substantive right beyond that already possessed under state law. If article IV privileges and immunities include natural law principles, courts could invalidate state laws as contrary to natural law—the very fear that disturbed the *Slaughterhouse* majority:

[Article IV] did not create those rights, which it called privileges and immunities of citizens of the states. It threw around them in that clause no security for the citizen of the state in which they were claimed or exercised. Nor did it profess to control the power of the state governments over the rights of its own citizens.

Cases, 83 U.S. (16 Wall.) 36, 75 (1873). In listing the rights of national citizenship protected by the fourteenth amendment privileges and immunities clause, Miller included rights already protected by other clauses of the Constitution, such as the right to petition peacefully for redress of grievances.

144. See *The Slaughterhouse Cases*, at 96 (Field, J., dissenting).

145. 314 U.S. at 182-83 (footnote omitted).

Its sole purpose was to declare to the several states, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction.¹⁴⁶

Historically, the article IV privileges and immunities clause professed to control state power over the right of citizens to leave and reenter. Recognition of that substantive right would not necessarily revive fundamental rights analysis or extend any greater right to a citizen in a state than the right to leave.

One final reason for ignoring article IV as the source of the right to travel is the Court's holding that it protects only against state action.¹⁴⁷ Under those precedents, a constitutional right to travel against private interference must be traced to another source.

Congress can legislate against private interference with interstate travel under the commerce clause. The pressure to find that such private behavior is not only subject to Congressional power but is itself a violation of the Constitution arose out of 1960's civil rights activity. Statutes enacted in the wake of the Civil War made deprivation of constitutional rights a federal criminal offense without defining the rights. Congress enacted nothing specifically punishing interstate travel interference. When Lemuel Penn, a northern black visiting a family in the south, was shot by persons who thought he was working for civil rights, it affronted northern civil rights workers. However, state court prosecution for civil rights murders was difficult; several defendants were found not guilty of Penn's murder despite strong evidence. Federal authorities tried to obtain a conviction in federal courts, but the only available statute applied to the deprivation of constitutional rights. In coping with the civil rights revolution and trying to find federal law applicable, the Court found a right of travel that may be claimed against individual as well as governmental interference.¹⁴⁸ The court ignored the constitutional text as an express source for the

146. 83 U.S. at 77.

147. In *United States v. Wheeler*, 254 U.S. 281 (1920), article IV was used as a basis for analyzing the right of interstate travel. That case resulted in dismissal of an indictment of private individuals for conspiracy to deprive individuals of their constitutional rights on the grounds that the right of interstate travel applies only against the state. The Court cited *United States v. Harris*, 106 U.S. 629 (1883) for the proposition that article IV privileges and immunities "like the 14th Amendment, is directed against state action." 106 U.S. at 643. *Harris*, however, did not deal with the right to travel.

148. *United States v. Guest*, 383 U.S. 745 (1966).

right, because all texts appeared limited to establishing a right against the state.

Curiously, article IV provides the best basis for finding a constitutional right to travel applicable against individuals. Unlike the commerce clause, the inference of a right to travel is not drawn from the allocation of government power. Unlike the fourteenth amendment, article IV is an individual right rather than a limit on state power. Article IV privileges and immunities may be limited to those granted by the state, but if the right to travel is inferred from the entitlement to privileges in other states, any entity preventing the citizen of one state from traveling to another state to obtain rights from that state would be interfering with the constitutional right. Thus, the right to travel could be applicable not only against state government, but also against private individuals and the federal government.

However, the scope of the article IV right is slightly ambiguous. The clause came from the Articles of Confederation provision in an agreement among independent sovereigns not directed at the conduct of individual citizens. The Continental Congress had no power to legislate for individuals and could not restrict interstate movement. The same clause in the Constitution had a new context. The agreement was "of the People" and not "of the States." Individuals theoretically could be bound by the document. Further, the federal government was given power to legislate directly upon individuals; therefore, federal power to restrict interstate movement became relevant. The reasoning which applied the right to interstate travel against private interference is valid whether rooted in article IV or in purely structural analysis. Linguistically, article IV could ground the same inferences that the Court drew from the national structure. It is written in terms of an individual right to obtain privileges and immunities in other states, so interference with the implicit right to travel to get those privileges could be a violation of the right, whether by private persons or by government.

Justice O'Connor is on excellent historical ground in rooting the right to travel in the article IV privileges and immunities clause. There are other advantages. Unlike the commerce clause, it can prohibit federal interference with interstate travel. Unlike the fourteenth amendment, it is not linguistically confined to a governmental prohibition. The use of article IV as the basis for the right to travel supports an important guarantee with constitutional text.

C. *The Right To Be Free of Discrimination Based on Place of Prior Residence*

Durational residence requirements for state governmental benefits do not restrict travel; the new residents suffer no loss by such a requirement in their new state because they were receiving no benefit from that state before they moved. Failure to grant the benefit is not a restriction on travel, but rather a discrimination against recent residents. That sort of discrimination led the Court to use equal protection analysis to test the validity of such durational residence requirements.¹⁴⁹ The Court frequently invalidated durational residence requirements because their purpose was to prevent residents' benefits from encouraging nonresidents to become residents. Discouraging persons from becoming residents is not a legitimate state objective. National citizenship implies the right to travel to another state and to establish residence there. Thus, the Court refers to the right to travel in the durational residence cases but continues to use the equal protection clause rationale in its decisions.¹⁵⁰ It refuses to root the right to establish residence in a new state in article IV, leaving it a vague inference from the nature of national government. If the Court acknowledged article IV as the source of the right to establish residence and citizenship in another state, it could avoid equal protection analysis in these cases.

These decisions have complicated an already complex equal protection analysis. The state may offer administrative convenience justifications for a residence requirement passing minimal scrutiny under equal protection, yet the Court finds the justifications inadequate. The higher degree of scrutiny does not flow from the denial of a fundamental right: the statute denies no fundamental right. The classification distinguishing between persons on the basis of length of residence does not share other suspect class characteristics. As Justice Harlan argued in *Shapiro*, where the grant of a benefit turns on the exercise or nonexercise of a protected right, the Court should normally analyze the state's behavior by whether it impairs the constitutional right and not whether it violates the equal protection clause.

Justice O'Connor developed the article IV right to travel theory in *Zobel* in the context of an Alaskan statute that distributed surplus state revenues to citizens on a graduated scale based on length of residence. The majority invalidated the statute under the equal

149. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969).

150. *Attorney Gen. of N.Y. v. Soto-Lopez*, 106 S. Ct. 2317 (1986).

protection clause, holding that rewarding citizens for past contributions was not a legitimate state purpose. Justice O'Connor disagreed, noting that some forms of compensation for past service to the state should be permissible. The determination of proper forms of compensation for past services should be judged, she argued, under standards derived from article IV. Although she used the term "right to travel" in conformity with past Court usage in durational residence cases, article IV application to a durational residence requirement is a separate concern.

Justice O'Connor noted that the clause assured a citizen of one state who ventures into another state the same privileges that citizens of that state enjoy. If a nonresident who enters for temporary commercial purposes is protected, "[a] *fortiori*, the Privileges and Immunities Clause should protect the 'citizens of State A who ventures into State B' to settle there and establish a home."¹⁵¹

Justice Rehnquist, dissenting, contended that article IV could not apply to the Alaskan scheme because "the clause has no application to a citizen of the State whose laws are complained of."¹⁵² Justice O'Connor responded that application of article IV was not limited to benefit nonresidents.

The fact that this discrimination unfolds after the nonresident establishes residency does not insulate Alaska's scheme from scrutiny under the Privileges and Immunities Clause. Each group of citizens who migrated to Alaska in the past, or chooses to move there in the future, lives in the State on less favorable terms than those who arrived earlier. The circumstances that some of the disfavored citizens already live in Alaska does not negate the fact that "the citizen of State A who ventures into [Alaska]" to establish a home labors under a continuous disability.¹⁵³

Article IV supports Justice O'Connor's position.¹⁵⁴ It applies to citizens of each state "in the several states," including the citizen's home state. The courts rarely find that article IV binds a state with respect to its own citizens, fearing a judicially defined "fundamental right" state law limit. That fear is groundless in Justice O'Connor's limited article IV context.

Article IV's privileges and immunities clause application to resi-

151. *Zobel v. Williams*, 457 U.S. 55, 74 (1982).

152. *Id.* at 84 n.3.

153. *Id.* at 75.

154. The citizens of each state shall be entitled to *all* privileges and immunities of citizens (i.e., to become indistinguishable from natives) in the several states (i.e., in any state of the union where they wish to go to become a citizen of that state).

dence requirements is historically correct. The earliest Articles of Confederation drafts of the clause specified application only to persons going to reside in another state. Consequently, the concern that persons changing residence to a new state be treated as citizens in that state appears to be a major reason for the constitutional article. The extension of the privileges and immunities of citizens to nonresidents was not intended to eliminate the earlier language's protection of new residents. Burke of North Carolina understood the clause to eliminate durational residence voting requirements. State constitutions had granted foreigners property rights upon entering the state and swearing allegiance but imposed a one-year residence requirement to become a citizen. If article IV recaptured the colonial citizenship privileges and immunities, the right to become a citizen of a state by change of residence to that state is embodied in the clause. The framers understood that one of the substantive privileges of citizenship is freedom from discrimination based on place of prior residence.

The adoption of the fourteenth amendment making state citizenship a function of federal citizenship and state residence does not prevent article IV from conferring all the privileges and immunities of state citizenship on persons relocating to the state. The fourteenth amendment citizenship provisions responded to Justice Taney's statement in *Dred Scott* that Blacks were not United States citizens and not entitled to sue as state citizens under article III diversity of citizenship provisions. The fourteenth amendment assures that Blacks born in the United States are recognized as citizens of both the United States and each state.¹⁵⁵ The fourteenth amendment determines who are the citizens of each state that are entitled under article IV to the privileges and immunities of citizens in the several states. Article IV secures the substantive right to a citizen of a state to not be discriminated against on the basis of prior residence.

Article IV's history does not foreclose all durational residence requirements. A provision enacted to promote federalism amid an article that secures in each state full faith and credit for the laws of other states should not be interpreted to forbid state residence requirements established to prevent the evasion of other states' poli-

155. In *Gassies v. Ballou*, 31 U.S. (6 Pet.) 761 (1832), the Supreme Court held that an allegation of United States citizenship and Louisiana residence is the equivalent of an allegation of state citizenship for article III purposes. Thus, the proposition that state citizenship was a function of residence plus federal citizenship was accepted prior to the fourteenth amendment.

cies.¹⁵⁶ Residence requirements for voting and holding office existed when the privileges and immunities clause was adopted, although there was some uncertainty over its effect on them. The rationale for the limits may have been the difficulty in ascertaining an individual's permanent intention to reside when interstate communication was by horse or sail and checking past residence was difficult and time consuming. Modern consideration of the constitutionality of residence requirements must take into account improvements in transportation and communication. Durational residence requirements to establish the bona fides of the residence claim may also be affected by the nature of the benefit sought. The decisions need not be affected by changing the analysis from equal protection to article IV. Article IV analysis, however, assures that the court will focus on the impact of the residence requirement on full recognition as citizen of the state.

D. *The Right of Nonresidents to Freedom from Discrimination*

The current Court disagrees over article IV's application to the right to travel and durational residence cases, but agrees that the clause prohibits discrimination in the privileges and immunities of citizens against nonresidents entering the state. It further disagrees on the meaning of "privilege or immunity" and distinguishes state laws under article IV, holding some laws create privileges and immunities of citizenship and some do not. The right to engage in a trade or business is a privilege or immunity of citizenship.¹⁵⁷ The right to hunt elk is not, because it is not "basic to the maintenance or well-being of the Union."¹⁵⁸ The Court has avoided defining the phrase beyond that necessary to each decision.¹⁵⁹ Among the rights outside the clause are the right to vote¹⁶⁰ and the right to state-owned goods.¹⁶¹ Justices Brennan, White, and Marshall reject this method of analysis. They would find that all rights of citizens are privileges and immunities and would decide the cases solely on whether the discrimination against nonresidents is justified.¹⁶²

The majority suggests a two-step analysis under the article IV privileges and immunities clause: first, whether the particular law

156. *See Sosna v. Iowa*, 419 U.S. 393 (1975).

157. *Supreme Court of N.H. v. Piper*, 470 U.S. 274 (1985).

158. *Baldwin v. Fish and Game Comm'n*, 436 U.S. 371, 388 (1978).

159. *Ward v. Maryland*, 79 U.S. (12 Wall.) 418 (1870).

160. *See Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874).

161. *See Baldwin*, 436 U.S. at 386.

162. *Id.* at 394 (Brennan, J., dissenting, joined by Marshall and White.)

involves a privilege or immunity of citizenship; and, if so, whether the different nonresident treatment is justified. The dissenters contend that only the second step is relevant. The selective colonial application of privileges and immunities and the exclusion of local variations from coverage were justified by local conditions. An adequate justification for disparity in treatment meant that a particular law was not a privilege or immunity. The court should borrow from dormant commerce clause analysis in which initial attempts to define its operation on a categorical basis were rejected in favor of an individualized analysis.¹⁶³ Privileges and immunities analysis should be parallel: citizens of each state are entitled to all rights afforded state natives unless there is a valid ground for denial.¹⁶⁴

163. Julian Eule has suggested that the article IV privileges and immunities clause is the appropriate constitutional text for use in proscribing protectionist state legislation. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 446-48 (1982). He would view the commerce clause as purely a grant of power to the federal government without implying any restriction on state power.

Madison's criticism of the violations of the Articles of Confederation privileges and immunities clause was leveled at state laws taxing vessels at a differential rate based on the owner's and crew's state of citizenship. The practice of port states taxing the imports of other states trading through them, however, he said resulted from the lack of a general commerce power. See *supra* note 13 and accompanying text. Where the discrimination was based on place of origin or destination of the goods or services rather than the trader's place of residence, there was no apparent violation of the privileges and immunities clause. Instead of protecting free trade, the clause protected only the recognition of common citizenship as it had existed prior to independence. A shift from reliance on the commerce clause to article IV reliance to protect interstate commerce would not only be inconsistent with the history of the clauses, but could curtail existing flexibility. Under the commerce clause, Congress may authorize state laws that protect local industries if it finds such behavior desirable. The privileges and immunities clause is drafted as an individual right, however, and it would not be reasonable to permit Congress to deprive individuals of constitutional rights. For that reason, extension of article IV to perform tasks it was not designed to do is dangerously unwise.

164. This past term the Supreme Court heard a case in which the federal district court in New Orleans refused to admit to practice before it, a member of the Louisiana bar who lived and had his office in Mississippi. *Frazier v. Heebe*, 107 S. Ct. 2607 (1987). A similar state residence requirement was held to violate article IV when applied by a state. *Supreme Court of N.H. v. Piper*, 470 U.S. 274 (1985). One issue raised in the case was whether article IV restricted the federal government as opposed to solely states, however, the Supreme Court did not reach the article IV question and reversed on different grounds.

The Court has labeled article IV privileges and immunities as those of state citizenship. That labeling dissipates any article IV claim against the federal government because it indicates that the claimant is entitled only to the treatment given a citizen by the state. If the clause requires that nonresident citizens be treated as citizens of that state, regardless of the source of treatment, article IV applies. The framers of article IV chose individual rights language rather than language of state restriction. On the other hand, the framers did not envision the current scope of federal power. A national government more provincial than the states themselves was not considered, and the clause was initially in a document consisting solely of separate state sovereigns. Thus history and language point in different directions.

If article IV does not bind the federal government, Congress might authorize state discrimination against nonresidents. The state law might be invalid as state law under article

One reason for adopting the dissenters' view is that the language of article IV was intended to perform several different functions. For the person changing residence, it secured every right of a citizen. Thus, the all encompassing definition is warranted. This was the practice that preceded the constitutional provision. On the other hand, the nonresident who visited the state did not have the same rights as citizens of the state. Visitors could not vote and they were subject to differences in civil process because of the problems of exercising power over nonresidents. "Privileges and immunities" function differently depending on the individual claimant's status. One is entitled to a particular benefit or exemption from a burden if there is no adequate justification for distinction. A citizen of the United States has a privilege or immunity to not be discriminated against on the basis of place of residence without adequate justification. Exclusion and protectionism are inadequate justifications.

Determination of the sufficiency of justifications for differential treatment of persons based on citizenship is still in a formative stage. Efforts to draw the lines of permissible distinctions depend more on current analysis than historic meaning, because the drafters paid little attention to the specific problems. Elaboration on the manner of linedrawing has already begun.¹⁶⁵

The nondiscrimination issue may arise in a unique fashion. Most laws favoring residents over nonresidents in trading run afoul of commerce clause restrictions as well as article IV problems. Privileges and immunities discrimination analysis is invoked primarily where the law addresses nonresidents doing intrastate business. It is thus particularly relevant to the problems raised by the application of the "market participant" commerce clause doctrine. The Supreme Court has held that states are not subject to commerce clause restrictions when acting as market participants rather than as market regulators. Thus, the state may choose to buy goods or services from, or to sell to, residents exclusively without implicat-

IV, but it could escape scrutiny incorporated as federal law. The structure and placement of this right indicates a concern for federalism rather than for an individual's protection. Nevertheless, the article requires that the right to interstate travel be secure against national as well as local restriction.

Article IV applied to the federal government would not inhibit justifiable federal legislation preferring residents of a state. It permits discrimination against nonresidents who pose a problem separate from parochial state interests in excluding community nonmembers. If the clause does not apply, the federal government may discriminate against nonresidents simply to satisfy parochial interests. A congressional majority could be mustered for provincialism, but it would destroy the article IV's national sense of citizenship.

165. See Varat, *State "Citizenship" and Interstate Equality*, 48 U. CHI. L. REV. 487 (1981).

ing the commerce clause.¹⁶⁶ Nevertheless, in *United Building & Construction Trades Council v. Mayor of Camden*,¹⁶⁷ the Court held that such purchase and sale decisions are subject to article IV privileges and immunities. The Court remanded the case to determine whether the nonresidents constituted a "peculiar source of the evil at which the statute is aimed."¹⁶⁸

Article IV applies to state and municipal market decisions when government decisions turn on the residence of the employees and management of a company rather than on its state of incorporation. Thus, although a corporation may lack article IV rights,¹⁶⁹ its em-

166. *Reeves v. Stake*, 447 U.S. 429, 436 (1980) (South Dakota operated a cement plant restricting sales to state residents. Supreme Court held the resident-preference program did not violate commerce clause (citing *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976) ("Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over other.")); *White v. Massachusetts Council of Construction Employers*, 460 U.S. 204 (1983) (Supreme Court held that commerce clause does not prevent mayor from requiring construction projects to employ at least 50% city residents).

167. 465 U.S. 208 (1984).

168. *Id.* at 222.

169. Under the current Supreme Court decisions, the privileges and immunities clause applies only to human beings. Corporations are not "citizens" for the purposes of article IV. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868). Hamilton linked article IV protections to article III diversity jurisdiction, and Taney did the same in *Dred Scott*. Nevertheless, present doctrine allows corporations to sue and be sued as citizens under the diversity of jurisdiction provisions of article III but does not permit them to claim article IV privileges and immunities of citizens.

The exclusion of corporations from article IV protection has been criticized.

The notion that corporations are not citizens for purposes of the privileges and immunities clause is more venerable than sound. It is, after all, people who do business in the corporate form, and the underlying antidiscrimination objectives of the clause can be thwarted as much by state discrimination against businesses incorporated in other states as by state discrimination against natural persons who make their homes in other states.

Varat, *supra* note 176, at 499 n.47.

The framers of the privileges and immunities clause did not consider corporations to be citizens for the purposes of the clause. The various drafts of the article as it wound its way into the Articles of Confederation referred to the protected class as "inhabitants," "citizens," and "free inhabitants." The standard of protection is variously the privileges of "natives," "natural born free Citizens," and "free citizens." These terms, especially the adjective "free," are applied to human beings and not abstract entities. The term "citizen" in the Constitution bears no indicia of an alteration to give it a special meaning applicable to corporations.

When the article was adopted, the corporation was an exceptional mode of doing business. Legislatures were suspicious of the corporate form. They granted charters only for exceptional purposes such as educational institutions, canals and water companies. J. DAVIS, *ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS* 22 (1917). If the grant of corporate status by one state were thought capable of imposing that corporation on other states, it would have aroused the bitter opposition of every state in the union. Madison had even noted that the power of a state to confer citizenship on an individual on a different basis than that of other states had been a source of friction for article IV of the Articles of Confed-

ployees may claim that the state's market decisions deny those rights to them.

Neither language nor history helps much in assessing the appropriateness of the Court's application of article IV to governmental behavior as a market participant. Language alone does not determine whether the opportunity to compete for government contracts is a privilege or immunity of citizens in the state. The circumstances of eighteenth-century governmental behavior mask the Framers' intent. Difficulty in transportation and communication largely confined governmental purchases and sales to local businesses. The creation of local preferences in this manner is not relevant to the constitutional issue.

Where an issue is not determined by language or history, a decision should be based on policy consistent with the constitutional language, history and structure. Article IV does not have the free trade focus of the commerce clause for which the state's regulatory or participatory character is relevant. Article IV creates a common national citizenship for citizens of the several states. The relevance of the state of residence is diminished. In that context, the Court's response is appropriate. States may favor residents in using their resources to participate in the market, but the favoritism must be

eration. Thus, the grant to Congress of power to make uniform rules for naturalization was an important element in improving the function of article IV in the Constitution.

Although the history of article IV demonstrates conclusively that corporations were not considered "citizens" for article IV purposes when the Constitution was adopted, the corporation has substantially altered its place in American society since that date. Exclusion of corporations from the ambit of article IV had little significance in 1787 when the small number of existing corporations were local in scope, and almost all business was conducted by individuals or partnerships. Corporate status is no longer a jealously guarded special privilege, but a readily available status frequently used by almost every form of business endeavor. Thus, Jonathan Varat has suggested that corporations should be considered "citizens" for article IV purposes in order to assure the vindication of the overriding purpose of nondiscrimination.

The interests of article IV in preventing state discrimination against nonresidents have not been ignored by the Supreme Court in connection with corporations. Instead, it has used the commerce clause and the equal protection clause to preserve the market viability of the companies incorporated in other states. One crucial step in the Court's article IV analysis was that the corporation's characteristics are not natural ones but defined by state law. Consequently, a corporation has no existence as such in any state where it is not incorporated. This led to decisions permitting states to charge a special tax of companies incorporated in other states as a "privilege" of doing business within a state. With the demise of the "privilege" tax, there is little need for additional protection for corporations under article IV.

The application of article IV results in an individual right that cannot be removed by Congress. It seems unwise to extend to the artificial creatures of a state a right to be free from discriminatory regulation by other states even where Congress finds such discrimination desirable.

justified. Therefore, the relevance of residence becomes the crucial issue when applying article IV.

VI. CONCLUSION

The constitutional article IV privileges and immunities clause evolved from a national colonial heritage. Colonial inhabitants were all originally the King's subjects, and no colony treated the inhabitants of other colonies as aliens. The Declaration of Independence destroyed this basis for unity. Article IV of the Articles of Confederation supplied the missing ties and preserved each of the colonial rights—to move freely between colonies, to be treated as a native of any colony where residence was established, and to be free of discrimination based on place of birth in commercial dealings.

The Articles provided no common sovereign for the people of the states. Individuals were citizens of a state according to state law. The only basis for national citizenship was asserted through the privileges and immunities clause. The Constitution created a national government which unified the disparate state governments. The constitutional privileges and immunities clause again cemented the ties among the states, but United States citizenship altered the clause's meaning and effect: a single sentence accomplished the diverse functions of the Articles of Confederation's provisions.

The clause's origin in the traditional rights of Englishmen produced an ambiguity which has been the source of a restricted constitutional definition of privileges and immunities. Colonists referred to the rights of Englishmen when they claimed broader rights of self-government and individual liberty than England granted them. When they decided to break with England, they justified their action by claiming they had been denied not just the rights of Englishmen, but of all people.

The privileges and immunities clause was intended to secure the former intercolonial privileges of movement, citizenship, and trade. It was not intended to institute natural law concepts; but the use of language that had been appropriated in political argument for that purpose enabled later generations to conflate and thus utterly confuse the possible meanings of the clause. One consequence of that confusion has been to discourage the Court from resting any substantive rights in the language of article IV. Recent attempts by Justice O'Connor to return the Court to article IV as the source of basic rights of interstate movement may restore the original prominence of that provision.

